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ABSTRACT

This packet contains complaints, memoranda, exhibits, orders, regulations, and stipulations in court cases dealing with expulsion or suspension of students from school or assignment of students to selected tracks. The report presents material from cases in which students were excluded from school or classes based on retardation, race, "medical reasons," pregnancy, citizenship, or other reasons. The report also contains material relating to classification practices based on race or national origin. (JF)

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March 1972

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TABLE OF CONTENTS

	Page Number
Introduction	
A. High School Tracking	1
B. Dimond, "Classification Practices: A Lawyer's Guide to Schools"	3
I. Exclusion of Children	11
A. Retarded Children	11
1. Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania (P.A.R.C.)	
a. Orders	11
b. Main Trial Brief	44
c. Draft Memorandum on Compensatory Education for Denial of Hearing	67
B. All Excluded Children Regardless of Reason	73
1. Mills v. Board of Education of the District of Columbia	73
a. Complaint	73
b. Sample Parent Affidavit	90
Sample Independent Evaluation	95
Sample Expert	97
c. Memorandum in Support	107
d. Supplemental Memorandum based on P.A.R.C.	157
e. Preliminary Stipulation and Order on Behalf of Named Plaintiff	168
C. Excluded Children and State Law	171
1. Wolf v. Legislature of State of Utah	171
2. Doe v. Board of School Directors, Milwaukee, Wisconsin	182
a. Temporary Restraining Order	182
b. Complaint	183
c. Brief	187

D. Excluded Children and Race Discrimination 194
  1. Givens v. Poe - Brief 194
  2. LeBanks v. Spears - Complaint 216
E. "Emotionally Disturbed" 233
  1. Association for Mentally Ill Children v. Greenblatt 233
F. "Medical Reasons" 233
  1. Marlega v. Bd. of School Directors of Milwaukee 233
G. Pregnancy 233
  1. Ordway v. Hargraves 233
  2. Perry v. Grenada Municipal School District 233
H. Aliens 233
  1. Hosier v. Evans 233

II. Special Education and Testing 234
  A. Due Process and Race Discrimination 234
    1. Stewart v. Phillips 234
      a. Complaint 234
      b. Memoranda 234
      c. Commentary on Denial of Motion to Dismiss 256
  B. Language and National Origin Discrimination 292
    1. Diana v. California State Board of Education 292
      292 Complaint
      b. Exhibits 301
      c. Points and Authorities 311
      d. Agreement 317
    2. Covarrubias v. San Diego Unified School District 320
    3. Guadalupe Organization v. Tempe Elementary School District No. 3 320

C. Race Discrimination 321

  1. *Larry P. v. Riles* 321

    a. Complaint 321
    b. Expert Affidavits 321
    c. Sample Evaluation 338
    d. Memoranda 344

D. Special Education Regulations 347

E. Model Special Education Bill 376

III. Other Classification Practices 376

A. Race 377

  1. Findley and Bryan, *Ability Grouping* 377

  2. *Johnson v. Jackson* 377

  3. *Lemon v. Bossier Parish School Board* 381

  4. *Singleton v. Anson County* 383

  5. *Griggs v. Duke Power Company* 386

  6. *Singleton v. Jackson* 390

  7. *Jackson v. Marvell School District No. 22* 390

  8. *U.S. v. Sunflower County* 390

  9. *Moses v. Washington Parish School Board* 390

  10. *Simkins v. Consolidated School District of Aiken County* 390

  11. *Hobson* v. *Hansen* 390

B. National Origin and Language Discrimination 390

  1. *Ruiz v. State Board of Education* 390

  2. HEW Regulations and Memoranda 390

  3. *Lau v. Nichols* 390

  4. Bilingual Bill 390

C. Within Classroom Tracking 390

  1. Rist, "Student Social Class andTeacher Expectations: The Self-fulfilling Prophecy in Ghetto Education," 40 Harv. Ed. Rev. 411 (August, 1970) 391

HIGH SCHOOL TRACKING

Tracking *is* secondary education in the United States. More than 90 percent of all student attend high schools that track, and most others attend specialized schools (such as vocational or elite schools) where the whole school is a single track. More high school students experience tracking than nearly any other educational characteristic — more than experience physics lab or a school nurse or a fully certified teaching staff. More students attend tracked high schools than can read or write.

What is "tracking?" A term seldom used by educators, it refers to the "differentiated courses of study" offered to high school students. These usually include a college, a business, a vocational, and a general track. Formally or informally, tracks are divided into "high" and "low," "honors" and "non-honors," or occupation-specific (mechanics, hairdressing, electrical) sub-tracks. (Vocational tracks are often located in separate schools.) The system's central feature is requiring or forbidding certain courses to students in each track. Electives and the number of credits required for graduation usually differ. Officially or unofficially, courses required in several tracks (such as English) are offered in separate sections that draw students from single tracks. Academic grades or class rankings are adjusted (often officially) on the basis of track assignment. Lowest track students earning straight A's may have the same class rank as D students from the highest track.

Lawyers can best understand tracking by talking to students and parents and examining school documents such as curriculum guides, rules for establishing class standing, rules and request forms for transfers between tracks, and lists of prerequisites for courses. The three characteristics of the system which emerge are (1) that tracking creates a hierarchy of social and educational standing not based on merit; (2) that the system ratifies social caste standings and reinforces social stereotypes; and (3) that it reduces most students' educational opportunities, but opens virtually no new job possibilities.

Educational Hierarchy

The practice of weighting grade point values differently for different tracks in computing class rank is virtually uncontrovertable proof that tracks are not "separate but equal" educations, or alternative paths to different kinds of quality education. General track students take fewer hours of class instruction than college track students do and have fewer options available when they graduate. Movement within the system is usually
in one direction — down. Assignments to
tracks often result from academic failure: stu
must often choose to repeat a year or cou
transfer to a lower track without losing c
"Long" falls (from the college track, say, t
general) are common. But the few students
rise to a higher track never move more th
single rung up the ladder (from the general t
say, to lower business.)

The most dangerous aspect of this hierarc
that *it is not based on ability.* Official sc
documents never set test score standards
assignment to a course of study. Indeed,
often state that the choice of a track is volun
While higher track students have higher test sc
— on the average, there is always conside
overlap between one track's lowest "scorers"
the highest "scorers" in the track below.

Learning One's Place

To assume that tracking reflects IQ test sc
or other measures of ability misunderstand
purpose. Social stability rests not on persons b
assigned their "rightful" social positions, bu
people coming to accept as "rightful" the posi
assigned them. This explains why trac
assignments always appear to be chiefly a ma
of free choice. Meanwhile, every aspect of
system gives students a "consistent" pictur
themselves that will lead them to cer
"choices." Previous electives or hobbies "sh
that certain students really do not want to g
college. And because tracking ensures
students spend their time with "others
themselves," students soon believe that lea
their place means abandoning friends to jo
group that never did like people like them.

The subtle social molding behind the myt
voluntariness explains these facts: vocati
education is very popular with non-ho
students, who view college track courses as re
boring. Poor parents whose children (even w
high achievement scores) do not go to col
insist it is wrong to push students into acader
when they want to be mechanics. (These stud
will probably pump gas — at best.) Girls insist t
want typing, so they can get jobs. In short,
system's purpose is to convince students
differences exist, and that they are one "kin
person" rather than another.

Above all, tracks reflect racial, linguis
sexual, and economic groups. Students "fi
their own "identities," and learn to think
themselves and others in broad social categor

Track compositions reflect the social disparagement of blacks, non-English speakers, women and the poor. While tracks do not create castes, they ratify society's rankings and instill parts of social stereotypes (smart and dumb, woman's job and man's job, competent and incapable, college bound and otherwise.) By learning apart, students learn to tell one another apart. They learn the stereotypes that tear the nation apart. This system is the cardinal reality within which high school students are emeshed.

Tickets to College

Another long-range effect of tracking is that it determines who attends four-year degree-granting colleges. College admissions require that students have pursued an academic course of study, have taken courses normally available only to college-track students, submit grade averages or class ranks adjusted for track assignment, and take achievement tests loaded with academic materials. Teachers' recommendations and guidance counselors' suggestions also play a large part in applying to or being accepted at college. So does a student's sense of himself as a college or non-college "type." In short, tracking determines chances for a college degree, today's best ticket to status, income and power.

Tracking, surprisingly, has *little* effect on which jobs non-college students get after school. With more than 40,000 jobs listed in the Dictionary of Occupational Titles, the most elaborate tracking system only provides a few dozen tracks. Few businessmen accept educators' character judgments as better than their own. Except for the racial, linguistic, sexual, and economic stereotypes shared by employers and schools, most non-college students receive a second chance at life when they leave school, (although they do not know that at the time).

The extent to which student's post-school occupations or earnings parallel their track assignments results from employers using the same stereotypes the tracking system ratifies, not because tracking creates differences. Some students also choose tracks because of jobs they know are open to them. If their older brothers are plumbers and can get them into the union, they take plumbing in high school to avoid boring academic slogging.

The National Educational Product

The reason why this discussion has focused high school tracking, rather than earlier forms, simple. Following young children through scho one confronts a confusing array of apparen splendid and humane classification practices. Ea step in the reification of student differences small and subtle, hard to find, and harder still fault. The system ends in secondary school wit few brutal partitions in the destinies of childr college or none, management or labor, a "ma job" or a "woman's job." The tracking syst *simplifies* human differences into a few divisio among children that are necessary to renew t nation's class structure. It makes crude a incorrect classificatory stereotypes (black a white, smart and dumb) seem part of a natu order. Only by viewing the end of the track system, where the national educational produ emerges, neatly packaged into different bundles human destinies, can one clearly see its purpo and power.

The disproportionately small numbers of po and black children who go to college are direc attributable to this system. It also teach non-college students to accept their "places life" and to employ cultural stereotypes. If, bei poor or black or female, they end up right whe they seemed to be heading in high school, th seems only natural. People will find their places, they really try — especially with schools there help them every step of the way.

CLASSIFICATION PRACTICES: A LAWYER'S GUIDE TO

by Paul R. Dimond

All schools sort and label children. Most assign them, usually on the basis of age, to grades K-12; at year's end, some are promoted while others are labeled "slow" and held back. Even before entering school, some children are labeled unprepared, or not mentally old enough, and prevented from beginning. Others, after entering school, are labeled "uneducable and untrainable" and excluded from all public educational opportunity. Some children are called "disruptive" or "insubordinate" and banished from school for varying lengths of time. Others are called "disturbed" or "retarded," and assigned to special classes. Some are labeled "fast-learners" and placed in "academic" tracks; "slow" learners are placed in classes which offer a watered-down education or a glorified baby-sitting service. Sorting also takes place within each classroom: teachers do give different children different grades. And children are counseled to take a curriculum or degree suited to their "capacities," like vocational education, college prep, honors, or general. Disproportionately, girls are assigned to advanced art or homemaking, boys to advanced math or shop; rich children to college prep, poor children to vocational; black children to general, white children to honors.

These school classification decisions are important. Children who are never permitted to enter elementary school can hardly secure a high school diploma; students who are not permitted to take the minimum number and kind of courses required for college admission can hardly secure a college diploma; students labeled "retarded" are likely to be viewed as "dumb" ever after; children in the college prep and honors programs are usually viewed as superior; children in other tracks, less than adequate. As the preceding article explained, the primary effects of most comprehensive tracking schemes are clear: they maximize the stigma to children in "bottom" tracks and minimize children's exposure to their own diversity and fundamental similarity. They also dictate who will not go to college and who will get the worst paying jobs. Worse yet, the school classification system often operates to perpetuate and confirm racial, sex, and class distinctions and castes in our society. Until the system of school classification is effectively challenged, the myth of the democratic, public, "common" school will perpetuate the failure of our schools, and society, to serve all children.

The term "classification" is used to s lawyer's basic approach to any grouping d it is subject to constitutional analysis unc the equal protection and due process clau legitimacy, effect, and process. In additio ever, there may also be state consitutio visions, statutes, and regulations with schoolmen must comply in classifying c Many states, for example, *require* that all c be given an educational opportunity at expense. This does not suggest that school cations are inherently repugnant nor ge unlawful, but it does mean that almost *any* classification decision can be analyzed by tional constitutional principles and the inte tion of diverse state law. What follows attempt to suggest how this analysis can b and applied to challenge present systems of classification.

I. The Legal Framework

The general framework of legal ana relatively straightforward. For purposes c stantive rights, equal protection and sta suggest that certain classifications are eith stitutionally suspect or simply unlawful.[1] ever education is viewed as a "fundamenta est" like travel[2] or voting,[3] *any* school cla tion arguably is subject to closer judicial s than merely a search for a rational relation a legitimate purpose.[4] As a result, the shifts to school officials to justify (prove) r their practices as necessary to promote a c ling interest. Given the senselessness of school classification practices — or their a effect or the absence of any effect — schoolmen cannot prove the worth of their c cations.[5] And even if courts in an era of j restraint will not require schoolmen to every classification, they may require proof necessity of a classification that undeniab volves total exclusion from all public educa In states where state law guarantees a free education to every child (and many state exclusion from *all* school opportunity is s unlawful.[7]

Wherever classification has the effe systematically and disproportionately singlin a minority group of a particular race or na origin for exclusion, placement in special c tion classes or the bottom tracks, it may "suspect classification,"[8] or a violation of Ti of the 1964 Civil Rights Act[9] (and contracts entered into thereunder by state and local school authorities not to so discriminate).[10] In such circumstances, school authorities often will not be able to bear the burden of justifying the adverse racial impact.[11] Moreover, if substantially racially disproportionate school assignments are prohibited by state regulation (as they are in some states),[12] the resulting racial classifications are simply unlawful.[13] Although the remedy in each case depends on the specific context, the remedial powers of equity courts are both broad and flexible.[14]

Some classifications can also be challenged as not rationally related to a legitimate state purpose. One example is assigning students to vocational education programs or general tracks which train them for jobs which no longer exist or which duplicate training which is required in any event. Such "education" simply provides *no* competitive advantage nor skill to those who undergo the school program compared to those who do not. Another example is exclusion from all educational opportunity. Because the only asserted state purpose in schooling is some form of education for the child, excluding the child from school eliminates the state's legitimate interest.

Finally, many state constitutions which require "common" schools suggest that the primary purpose of school is the development of "good citizens."[15] The premise of the "common" school is to bring children together to share experiences and be exposed to, if not accept, each other's diversity. The premise of "citizenship building" provisions in state constitutions[16] is similar: the children should learn about each other from each other, about their differences, complexity, variety, and similarities in character, belief, and skills. These goals may seem trite and naive in 1972, but they may remain the goals and purposes which some state laws *require* schools to carry out. Most comprehensive tracking schemes fundamentally subvert these "non-academic" goals. In theory, tracking represents an "academic" goal, an attempt to keep children's learning from being hindered through association with others of different abilities and learning backgrounds; in practice, tracking maximizes stigma and minimizes in-school contact between children of diverse races, social classes, sexes, abilities, and backgrounds. In sum, comprehensive tracking may be so in conflict with the explicit authority and "non-academic" purposes underlying delegation of power to state and local boards as to be *ultra vires*. If so, schools lack the power to track children between classes.[17]

Legitimate procedures. In most classification decisions, regardless of the merit and success of the challenge to the classification itself, the process by which classifications are made may be attacked. Even if school administrators are unwilling to limit their prerogative to make a given type of classification (and courts are unwilling to intervene), the right to fairness in the process of making each individual decision may be accepted by the schoolman (or required by the judge). The principle is that *before* any child is stigmatized by public authority,[18] or denied any important public good,[19] he is entitled to some minimal fair procedure in the decision-making process.

There is growing agreement that a child has a right to a prior hearing by school authorities before he is excluded[20] from school for any reason.[21] The scope of the hearing, however, is not entirely clear; but depending on the exact circumstances it may include most of the guarantees set forth in *Goldberg v. Kelly*, 397 U.S 254 (1970) (hearing before termination of welfare benefits).[22] In two other cases, movement toward use of an independent hearing examiner, in the form of a *court-appointed* master, was realized.[23] A "hearing," in the context of many school classifications, should also include a full, and independent, educational *and* medical evaluation of the child.[24]

A second issue is the type of school classification to which a right to a hearing should attach. Several cases have held that hearing rights apply before assignment to any "special" education program.[25] In *P.A.R.C. v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E. D. Pa. 1971), the Court held that notice and hearing must be accorded any allegedly mentally retarded child recommended for *any* fundamental change in educational status. The constitutional theory of this case (if not the actual holding) is applicable to any significant change in educational status, to assignment to any class or program other than the regular college prepatory[26] transition through elementary and secondary education: if a fundamental public good, like education, is to be provided by public school officials in different quantities to different students, and especially where any stigma attaches to this classification, a full dose of process should be due. Similarly, the test instruments used and school testers making a particular classification, or use of tests to assign children, are subject to attack as being fundamentally unfair.[27] Finally, as the purpose of any classification is to benefit the child, a fair procedure requires that initial assignments be periodically reviewed to determine their effectiveness; then can the child be reassigned to an "appropriate" program to make the purpose of classification real. Once again, however, the cases involving total exclusion and assignment to special education classes are the most winnable simply because they involve the clearest deprivation of "regular"schooling and stigmatization of the child as an educational outcast.[28] But the theories developed in these cases can be used as a springboard to attach due process rights to the entire system of comprehensive tracking so prevalent in American schools.

In school classification decisions two other types of quasi-"procedural" guarantees may also attach. The first is "prior notice" in the sense of an understandable standard, a standard which is neither so overbroad that it includes constitutionally protected freedoms nor so vague that it fails to inform the student what specific conduct is proscribed.[29] A similar requirement is that "ascertainable standards" exist for all school classification decisions. The distribution of labels and diverse education assignments cannot be allowed to rest on arbitrary administrative fiat[30] or a family's political influence. If waiting lists are permitted at all for entry in special education programs,[31] for example, there should be standards for admission that are ascertainable and fair, e.g., specific need, lottery, or length of wait.[32] This "ascertainable standards" test might also apply to effective exclusions from diverse specialized programs which in many districts are in theory voluntary; school authorities then would be prevented from arbitrarily limiting the choices of students merely because a unique program was crowded or located in a particular school.[33]

Cases and Materials Available in the "Classification Packet."[34]

The case materials, which include complaints, briefs, affidavits, unreported opinions, stipulated agreements, and consent decrees, are arranged primarily by type of school classification. The legal theories and remedies, however, often overlap these rather arbitrary categories. Briefs on exclusion of retarded children, for example, may have considerable relevance to assignment to special education classes; and briefs on prior hearings for exclusion may relate to prior hearings for any educational assignments.

Exclusion. The first materials, o
children from all publicly supportec
opportunity, present the clearest anc
ous wrong, and represent the most lik
court. *Pennsylvania Association of R*
dren v. Commonwealth of Penns
F. Supp. 1257 (E.D. Pa 1971) involve
attack on the exclusion of childr
schooling because of their asserted
The suit seeks the provision of *so*
supported educational opportunity fo
regardless of severity of retardation
equal protection clause. It also asks, u
process clause, for an *appropriate*
opportunity for every child through
ing procedure. The hearing proced
notice, independent evaluation, hear
designee of the Secretary of Educat
counsel, and appeal to a court-appoi
There is a *presumption* that regula
attendance is appropriate, and school
must prove that any other educatio
appropriate. The full range of school,
regional, statewide, and private servi
considered in determining what progra
priate for placement at public expense;
ic review of educational placement is re
question of whether the hearing proc
substantive rights) apply to the mult
capped, the physically handicapped, o
removed from a regular class for
remains unsettled. (The coverage of
procedure will be tested to determine
this regard.) In any event, because m
labels applied to children to justify
either arbitrary or interchangeable, th
the court's order will be frustrated
coverage of the hearing procedure is v
Children are excluded or placed in "lov
for all variety of reasons and labels. Ch
name of the game should not alter
ground rules. (In *Association for M*
Children v. Greenblatt, C.A. No. 71-
Mass.) a similar suit has recently bee
behalf of the excluded children who
classified as emotionally disturbed in
setts.)

Mills v. Bd. of Ed. of D.C., C.A. No. 1939-71 (D.D.C.) attacks the practice of exclusion directly by using similar constitutional theory on behalf of the class of *all* children excluded from school for *any* reason. The name plaintiffs include a range of handicaps and asserted disciplinary problems. The suit avoids labels, however, and treats the class of excluded children as a unit. Local law claims for both the substantive right to education and procedural guarantees are included, as are additional constitutional "void for vagueness" arguments. The remedy sought is similar to the *P.A.R.C.* suit. The case is presently in trial; preliminary relief has been granted to name plaintiffs and a final decision or settlement is expected with relief to be effective for the 1972-73 school year.

In *Wolf v. Legislature of the State of Utah*, Civ. No. 182646 (Third District Court, Salt Lake County, Utah) (Jan. 1969), a state trial court interpreted the Utah Constitution and laws as guaranteeing every child an educational opportunity within the public school system. In *John Doe v. Board of School Directors, Milwaukee, Wisconsin* (Milwaukee County Circuit Court) (April 13, 1970), a Wisconsin state trial court judge acted on similar grounds to require the immediate placement of children on waiting lists for special classes.

In ***Marlega v. Bd. of School Directors of Milwaukee***, C.A. No. 70-C-8 (E.D. Wis.), a federal court, by consent agreement, required school authorities to provide a prior hearing before exclusion of any children for alleged "medical reasons." In *Perry v. Grenada Municipal School District*, 300 F. Supp. 748 (N.D. Miss. 1969), and *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass 1971), federal judges ordered school authorities to reinstate pregnant students in regular school programs; in effect, both courts held that the woman's interest in education was more important than the school authorities' reasons for exclusion. In *Hosier v. Evans*, 314 F. Supp. 316 (D. St. Croix 1970), a federal judge made a similar ruling on behalf of resident aliens.

In *LeBanks v. Spears*, C.A. No. 71-2897 (E.D. La.), plaintiffs are attacking the exclusion of retarded children from all educational opportunity, much as in *P.A.R.C.*, except that allegations of racial discrimination and substantially adverse disproportionate racial effect on black children are also included. In *Givens v. Poe*, C.A. No. 2615 (W.D. N.C.), a traditional "due process" student rights claim is buttressed by an underlying racial classification insofar as black children are disadvantaged by substantially disproportionate discipline in a newly desegregated school.

In each of these cases the triggering interest at stake is deprivation of all educational opportunity; but several of the suits also turn to the question of a decent procedure and fairer system of classification for all children throughout the schools in specifying a complete remedy.

Assignment to Special Education Programs

Assignment to special education tracks often places a stigma of inferiority on the child and relegates him to a demonstrably inferior school program, and a lower chance of receiving a high school diploma or even gaining self-sufficiency in adult life. Many of the special education programs are burial grounds for students; many parents, therefore, want the children kept out of these classes (or would if they understood what special education all too often is about) or demand that special classes make good the promise of special benefit to the child. Arguments based on both due process and race or language discrimination can be supported by facts and by constitutional theory. In many schools, moreover, such assignments can be made only by consent: under these circumstances a full and independent evaluation and hearing must be given if the family's choice is to be exercised in a meaningful way.

In ***Stewart v. Phillips***, C.A. No. 2615 (D. Mass.), allegations of racial discrimination (based on disproportionate assignment of black children, language difficulties, test bias), inadequacy of evaluation and school testers, and other violations of procedural rights were made. A federal judge denied a motion to dismiss, primarily on the ground that such assignments constituted stigmatization of the child by public authority which, under *Wisconsin v. Constantineau* 400 U.S. 433 requires a prior hearing.[15] Subsequently, new statewide regulations on both substantive and procedural rights for placement of allegedly retarded children were adopted. The regulations call for a full prior evaluation, the elimination of the use of labels insofar as possible, integration into regular classrooms insofar as possible, and an appropriate publicly supported program of education for all children.

In *Diana v. California State Board of Education*, C.A. No. C-70 37 RFP (N.D. Cal.) (Feb. 3, 1970), and *Guadalupe Organization v. Tempe Elementary School District No. 3*, No. Civ 71-435 Phx. (D. Ariz.), plaintiffs attacked the disproportionate placement of non-English speaking children (Spanish and Yaqui Indian) in special education classes on the basis of English language tests administered by English-speaking testers. *Diana* resulted in a consent decree requiring the development of tests normed solely by the Spanish-speaking test population (the equivalent of proportionate placement); the *Tempe* case has survived a motion to dismiss. The remaining issue, of course, is whether bilingual instruction will be provided the children so that they will be able to understand and learn "equally" with English-speaking children when it is accepted that minority children should be in "regular" education programs in proportionate numbers.[36]

In *Covarrubias v. San Diego Unified School District*, C.A. No. 70-394-T (S.D. Cal.), a similar claim was made, but the suit attempted to protect the rights of black as well as Spanish-speaking pupils. And in *Larry P. v. Riles*, C.A. No. C-71-2270 (N.D. Cal.), a suit has been brought on behalf of black children who are disproportionately labeled retarded and assigned to special education classes. The specific allegations include bias in the tests and testers based on language and culture differentials, failure to use the lower cut-off point (recommended by the test-maker) for labeling and assignment to classes for the mentally retarded, and the harm and stigma resulting from the classification.

As in most of the other cases discussed above, independent retesting of the plaintiffs showed that the school erred in evaluating the children. School testers and evaluators often err and there is a large overlap in tested abilities and potential of children in various "educational" tracks and programs. In such circumstances, plaintiffs' claims of wrong are difficult to deny, but remedy remains a problem beyond better procedures for all school classification: roughly proportionate representation by race in special education classes, or shrinking the total numbers in special education classes, may only place poor, black, Spanish-speaking and other minority children disproportionately in the general degree program. That is, of course, an improvement. But a full remedy requires at least that minorities also be represented proportionately, for example, in technical, academic, and honors programs.

Non-English Speakers

The issue remains, therefore, what can be done to attack *other school classification practices.* The answers, unfortunately, are not readily apparent nor winning in court.

Lau v. Nichols, No. 26, 155 (9th Cir.) is an attempt to promote some affirmative programs for those whose native tongue is other than English so that they may have the opportunity to profit as

the trial court level and has been reposi
appeal in the Ninth Circuit for eighteen m
The case is based on federal and stat
arguments about effective discrimination o
basis of national origin or race. HEW, pursu
Title VI of the Civil Rights Act, has attempt
force the same affirmative obligation on
school districts to provide a meaningful educ
al opportunity to children whose primary lan
is other than English as consideration fo
federal education aid. This may create
prospect of eventual private enforcement of
contracts under a third party beneficiary th

Tracking Practices

But comprehensive tracking also isolate
poor and black disproportionately in lower tr
An HEW-commissioned study team recently
cluded that the only educationally legitimate
of classroom grouping practice was on a subjec
subject basis with separate evaluations of
type skill.[37] Yet, in fact, tracking by educati
status across the board is the most com
practice. In several cases involving formerly
schools, courts have grappled with comprehen
tracking schemes and testing.[38] The judgm
and analyses of the issues have not been unifo
but in the Fifth Circuit, at least, "ability gro
ing," except on a proportional basis, must
eschewed by newly desegregated schools, at l
for "several years."[39] In *Simpkins v. Consolid*
School District of Aiken County, C.A. No. 71-
(D. S.C.) (August, 1971), however, a district ju
in South Carolina on a motion for prelimin
relief reached the opposite conclusion, find
tracking beneficial for all the children and teach
despite its obvious segregative effects on classro
compositions.

In the "North" the analysis of trac
generally, where there are racial effects, shoul
the same as used in exclusion or assignmen
special education classes: it should constitu
"suspect classification."[40] The difficulty is
judges may not be as moved by either due pro
or equal protection arguments. Yet proof
available that tracking, insofar as it disproporti
ately closes the door to college for the poor
blacks, is terribly important to post-school inco
and jobs; that tracking creates stigma and bel
about which children are superior and which
inferior; and that most tracking systems in oth
respects are simply unrelated to any legitim
educational purpose or preparation for jobs.

such a racially discriminatory and baseless pattern of school classification. The outcome in the courts is by no means settled. This suggests that resort to the political process in many instances will be the forum of first and last resort.

Yet the remedy for such a broad racial attack on tracking is not fully clear. Roughly proportional grouping by race in each track or "total elimination" of tracking seem the primary alternatives; each appears less onerous. Individual choice is also a possibility, but in theory many comprehensive tracking systems already operate on that premise and the results and practices in fact are little different from compulsory, segregated assignments. Counseling, teacher recommendations, testing, labeling, and different educational programs – tracking – seem the rule in American education. And even if, as in Washington, D.C., and Detroit, formal systems of tracking are "abolished," they are often replaced by duplicate systems of an informal nature. Even if children are placed in the same classroom on a random basis, they may just be passed through the same classification process by the individual teacher.[42]

That suggests an additional approach – a *process* of critical analysis of tracking decisions as they affect individuals and the efficacy of the entire system of classification. Because the purpose of education is to benefit the child, it is not asking too much to require schools to evaluate the benefit of their specific educational assignments, the effectiveness of their grouping methods, and the availability of alternative approaches[43] to education programs. That might help insure that children who are "misclassified," or whose educational program is failing to benefit them, will be "reclassified" and given a more appropriate educational program. Given the importance of school classification, we can hope and argue and demand that procedural due process requires that much.

Consumerism in Education

The key to any ultimate reform in the present system of American education, therefore, may be awakening the consumers of education services to the real facts of present school classifications. Only then will there be a constituency to enforce possible court decrees and demand that school classification not create, confirm and perpetuate artificial and invidious castes in our society. The process of awakening may require new types of education litigation, breaking down the system with "fair" hearings, tort suits under state or common law, and even breach of contract or unconscionable contract theories. The process of awakening may also be made to happen by pressing for the legislative and administrative reform and by bringing the types of lawsuits described in this packet. Lawyers especially should be thinking innovatively about how to proceed in this battle, but without forgetting the present theories of equal protection and due process and the search for existing state and federal laws. In particular, the procedural reforms for the particularly obvious wrongs of school exclusion and assignment to special education classes may extend to *all* important school classifications.

Each child or parent who walks into a law office complaining about a school classification requires redress for himself and represents the first opportunity to look deeper into a school system with many more students like him. The reason to help him is clear, for most tracking and classification practices – like many other school issues – present ethical, moral and political rather than purely educational questions. The objective is simple: make the schools, administrators, counselors, and teachers serve the family, not rule it. Many school classification practices do exactly the opposite.

[1] First, fourth and fifth amendment freedoms may also suggest in a few particular contexts, not discussed hereafter, that given school practices are constitutionally suspect. For example, curtailing a child's right to distribute literature by prior restraints or the general threat of expulsion are inconsistent with the right of free expression. See, generally, The Student Rights Litigation Packet, available at the Center, for a discussion of these types of issues.

[2] *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

[3] *Harper v. Va. St. Bd. of Elections,* 383 U.S. 663, 670; *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

[4] Compare the cases cited above with *Morey v. Doud*, 354 U.S. 457, 465-466 (1957) and *McGowan v. Maryland,* 366 U.S. 420, 426-428 (1961).

[5] *Serrano v. Priest*, 5 Cal. 3rd 584 (1971) (education finance); *Dunham v. Pulsifer,* 312 F.Supp. 411 (D. Vt. 1970) (Discipline on tennis team for long hair).

[6] E.g., *Hosier v. Evans*, 314 F. Supp. 316, 319-21 (D. St. Croix, 1970) (exclusion of aliens from public schools); *Ordway v. Hargraves*, 323 F.Supp. 1155 (D. Mass. 1971) and *Perry v. Grenada Municipal School District,* 300 F.Supp. 748 (N.D. Miss. 1969) (exclusion of pregnant students from public schools); *Vought v. Van Buren Public Schools*, 306 F.Supp. 1388 (E.D. Mich. 1969) (exclusion for distributing underground newspaper containing four letter words); *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa., 1971) (exclusion of retarded children).

[7] See, e.g. Utah Constitution, Article III, Fourth; New Mexico Constitution, Article XII, Sec. 1. See also *Doe v. Board of School Directors, Milwaukee, Wisconsin* (Milwaukee County Circuit Court) (April 13, 1970). *Wolf v. Legislature of the State of Utah,* Civil No. 182646 (Third District Court, Salt Lake County, Utah) (Jan. 1969).

[8] See, e.g. *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967), 327 F.Supp. 844 (D.D.C. 1971); *Korematsu v. U.S.* 323 U.S. 214, 216 (1944); *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954). See also *Givens v. Poe*, C.A. No. 2615 (W.D. N.C.); *Stewart v. Phillips,* C.A. No. 70-1199-F (D. Mass); *Diana v. California State Board of Education,* C.A. No. C-70 37 RFP (N.D. Cal) (February 3, 1970); *Larry P. v. Riles,* C.A. No. C-71-2270 (N.D. Cal).

[9] 42 U.S.C. 2000d. See also 45 C.F.R. Part 80.

[10] The "discrimination" may include the uses of obviously, and not so obviously, racially biased tests, or tests unrelated to the purpose for which used. Cf. *Griggs v. Duke Power Co.,* 401 U.S. 424; *Diana, supra; Guadalupe Organization v. Tempe Elementary School District No. 3,* No. Civ. 71-435 Phx. (D. Ariz.); *Larry P., supra.* The "discrimination" may also include a showing that a stigma and/or harm attaches to the particular education status to which the minority is disproportionately over-assigned.

[11] See *Hobson v. Hanson*, 269 F.Supp. 401 (D.D.C. 1967); and cf. *Singleton v. Jackson*, 419 F.2d 1211, 1219 (5th Cir. 1970) (en banc); *Johnson v. Jackson Parish School Board,* 423 F.2d 1055 (5th Cir. 1970); *Jackson v. Marvell School District No. 22*, 425 F.2d 211 (8th Cir. 1970); *Lemon v. Bossier Parish School Board,* 444 F.2d 1400 (5th Cir. 1971); *Singleton v. Anson*, C.A. No. 3259 (W.D. N.C. 1971); and *Moses v. Washington Parish School Board,* 330 F.Supp. 1340 (E.D. La. 1971). But cf. *Simpkins v. Consolidated School District of Aiken County*, C.A. No. 71-784 (D. S.C.) (August, 1971).

[12] See, e.g., Illinois Rules Establishing Requirements and Procedures for the Elimination and Prevention of Racial Segregation in Schools, Rule 5.7; California Education Code, Section 6902.06.

[13] It might also be argued that some classifications which single out poor children for disadvantage are suspect. See *Williams v. Page,* 309 F.Supp. 814 (N.D. Ill., 1970), *reversed,* Appeal No. 18536 (C.A. 7, June 9, 1971) (unreported order), *cert. denied,* 40 U.S.L.Wk. 3288 (1971); but see *Johnson v. N. Y. State Education Dept.*, 319 F.Supp. 271 (E.D. N.Y., 1970), *affirmed,* 449 F.2d 871 (2d Cir., 1971) (Judge Kaufman dissenting), petition for certiorari filed, November, 1971, No. 71-5685, October Term, 1971 (school fees). Similarly, it could be argued that all children represent an "insular minority" deserving of special judicial protection, cf. *U.S. v. Carolene Products,* 304 U.S. 144, 155 N. 4 (1938): thus any classification involving children is suspect. Cf. Coons, Clune and Sugarman, *Private Wealth and Public Education* (1971).

In this regard it should be noted that exclusion from all publicly supported educational opportunity is a peculiarly virulent "wealth" classification: excluded children must pay for whatever education they receive, while all other children are provided access to schooling free; stated another way, all children are provided access to education dollars except those who are excluded. Cf. *Hobson v. Hansen*, 327 F.Supp. 844 (D.D.C. 1971).

[14] *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1. Where disproportionate representation is at issue, three types of remedies are possible: proportionate representation, elimination of the classification altogether, and new procedure for classification. Each remedy could be accompanied by compensatory education outside the regular school day.

[15] See, e.g., California Constitution, Article IX, Sec. 5; New Mexico Constitution, Article XII, Sec. 1; Utah Constitution, Article III, Fourth. But such "non-academic" concerns cannot be used by school authorities to deny children academic degrees and diplomas which they have earned by academic performance: withholding diplomas is a questionable disciplinary practice at best. See *In the Matter of Lucy Carroll* (Chancellor, N.Y. City Bd. of Ed., Dec. 6, 1971).

[16] See, e.g., Massachusetts Constitution, Sec. 2.

[17] More clearly, however, where the school district operates a voluntary plan of tracking — that is, no assignment can be made without the consent of the family — the lawyer can move to protect the family from all pressures and limitations placed by school authorities on theoretical choice in order to get the child in the assignment preferred by the family.

And in some states, notably Massachusetts, a tort action is provided by statute for wrongful exclusion from any educational program including by reason of race, religion, sex, or national origin discrimination. Mass. General Laws, Sections 5 & 16 of Chapter 76. In at least two other cases damages have been awarded for wrongful exclusions. *Pyle v. Blews,* No. 70 1829-JE (D. Fla., March 29, 1971) and *Roe v. Deming*, 21 Ohio State 666 (1971).

[18] *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

[19] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[20] The term "exclude" is meant to apply to any extended denial of educational services, regardless of asserted reason. Whether and in what form such hearing rights attach to more limited "suspensions" is still unsettled. See Buss, "Procedural Due Process For School Discipline: Probing the Constitutional Outline" 119 Pa. L. Rev. 545 (1971). In no event, however, should a series of cumulative "suspensions" be viewed as anything other than "exclusion;" and in every case, except where some heinous or riot causing conduct has occurred, press for a hearing before *any* forced absence from the school building. And even if exclusion from the school building is approved, some educational opportunity should still be provided.

[21] See e.g., *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Scoville v. Bd. of Ed. of Joliet*, 425 F.2d 10 (7th Cir. 1970); *Vought v. Van Buren*, 306 F.Supp. 1388 (E.D. Mich. 1969); *Knight v. Board of Ed.*, 48 F.R.D. 108, 115 (E.D. N.Y. 1969); *Sullivan v. Houston Independent School District*, 307 F.Supp. 1328 (S.D. Tex. 1969); *Marlega v. Bd. of School Directors of Milwaukee*, C.A. No. 70-C-8 (E.D. Wis.); *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa., 1971). Compare *Madera v. Board of Education of New York*, 386 F.2d 778 (2d Cir. 1967), reversing, 267 F.Supp. 356 (S.D. N.Y. 1967), *cert. denied,* 390 U.S. 1028 (1968).

[22] For example, in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, C.A. No. 334 F.Supp. 1257 (E.D. Pa. 1971) the hearing included notice; examination of all documents, evaluations and witnesses upon which the school's decision was based right to independent evaluation; and prior hearing with right of representation, cross-examination, presentation of evidence, and a written opinion.

[23] *P.A.R.C., supra*, and *Knight v. Board of Education*, 48 F.R.D. 108, 115 (E.D. N.Y. 1969). In *Knight*, moreover, the remedy for denial of prior hearing rights was *not* just a "fair hearing;" the provision of compensatory education to make up for the period of wrongful exclusion was also required. (This is the equivalent of back pay in employment cases and retroactive benefits in welfare cases.)

And in certain gross classification cases, it may be possible to argue that school authorities have defaulted so greatly in their legal obligation that the school system must be placed in receivership. Such remedy has been invoked, however, only in a few cases where school systems have failed totally to dismantle dual school systems. See *Turner v. Goolsby*, 255 F.Supp. 724 (S.D. Ga. 1966).

[24] See *P.A.R.C., supra*, and Massachusetts Special Education Regulations, General Laws, Chapter 71, Section 46.

[25] See *Marlega v. Bd. of School Directors of Milwaukee*, C.A. No. 70-C-8 (E.D. Wis.), *Stewart v. Phillips*, C.A. No. 70-1199-F (D. Mass.), *P.A.R.C., supra.*

[26] The college preparatory program is here chosen as the "norm" because it is one educational "input" which is directly associated with outcomes. See the preceding article.

[27] See *Stewart v. Phillips*, C.A. No. 70-1199-F (D. Mass.); *Diana v. California State Board of Education*, C.A. No. C-70 37 RFP (N.D. Cal. Feb. 3, 1970); *Guadalupe Organization v. Tempe Elementary School District No. 3*, No. Civ 71-435 Phx. (D. Ariz.); *Larry P. v. Riles*, C.A. No. C-71-2270 (N.D. Cal.). Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In particular, "school psychologists," are vulnerable to attack as non-experts unsuited to making important judgments about a child's educational status; they are frequently not trained, not even credentialed, to make such judgments. Also where tests are used to assign substantially disproportionate numbers of minority children to an inferior education status, such classifications, as noted, are suspect, and the entire procedure of evaluation and assignment is subject to close scrutiny.

[28] A careful search of state law and regulations is also essential. Many may provide equivalent prior "evaluations" for several types of classification decisions. See, e.g., Massachusetts Special Education Regulations, General Laws, Chapter 71, Section 46. See also Massachusetts General Laws, Chapter 76, Section 16, which provides for a *tort* action for unlawful refusal to admit, or exclusion of, a child from any school or program of study.

In addition, once a particular "remedial" assignment of a child has been made, there must be a regular and periodic review to determine whether the particular assignment is "helping" the child; if not, the "remedial assignment" merely becomes a useless label attaching to a meaningless education. Without a periodic re-evaluation of the child's educational status and "special program" to which assigned, mistakes in judgment or changes in the child's status can never even be discovered: without periodic review the particular assignment becomes a burial ground. See *P.A.R.C. v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa., 1971), and *Mills v. Bd. of Ed. of D.C.*, C.A. No. 1939-71 (D.D.C.).

[29] *Sullivan v. Houston Independent School District*, 307 F.Supp. 1328 (S.D. Tex. 1969); *Crossen v. Fatsi*, 309 F.Supp. 114 (D. Conn. 1970); *Soglin v. Kaufman*, 295 F.Supp. 978 (W.D. Wis. 1968).

[30], A somewhat related state law doctrine is that school officials may take no action which is not authorized by state law: it is *ultra vires*. See *Mills, supra*.

[31] Cf. *Doe v. Board of School Directors, Milwaukee, Wisconsin* (Milwaukee County Circuit Court) (April 13, 1970), where under state law no "wait" was allowed before admission to special education classes.

[32] Compare *Holmes v. N.Y. Housing Authority*, 398 F.2d 262 (2d Cir. 1969)

[33] In Boston a forthcoming study by the Center suggests that such "arbitrary" limitations placed by school authorities on "choice" of program are racial, social and sexual. The study also reveals how "choice" is in fact subverted by (1) requiring seemingly innocuous decisions on electives at an early age which keep children afterwards in a particular educational program, (2) counseling and grading practices which have the same effect, (3) "choice" forms which suggest the response desired by the school.

[34] The "Classification Packet" is available to Legal Services Programs and Attorneys free and to all other groups for a fee.

[35] But cf. *Madera v. Board of Education of City of New York*, 386 F.2d 778 (2d Cir.1967), *reversing*, 267 F.Supp. 356 (S.D. N.Y. 1967), *cert. denied*, 390 U.S. 1028 (1968), which suggests that the "hearing" which is due in the context of assignment to special classes is quite limited. *Madera*, however, seemed to show a complete lack of awareness of the importance of such decisions, the need for full and independent evaluations, and the dangers of misclassification. The decision, therefore, stands as an unquestioning acceptance of school authority, rather than a protection for individual rights.

[36] A "Bilingual, Bicultural Packet" will soon be available from the Center upon request.

[37] Findley and Bryan, *Ability Grouping: 1970. Status, Impact, and Alternatives.* Center for Educational Improvement, Athens, Georgia, January, 1971.

[38] *Singleton v. Jackson*, 419 F.2d 1211, 1219 (5th Cir. 1970) (*en banc*); *Johnson v. Jackson Parish School Board*, 423 F.2d 1055 (5th Cir. 1970); *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5th Cir. 1971).

[39] *Lemon, supra* at 1401. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court suggested that tests which are unrelated to "job performance" and which disproportionately disadvantage blacks are suspect. Yet in school testing, what constitutes "job performance" is unclear. If it is school performance, then tests used for placement are simply self-fulfilling prophesies: you get a low score, you go to the dumb class, you will perform like a dumb kid. The attack, therefore, should be made against the premise of the system: "diagnosis-prescription-remedy." In fact "diagnosis" is difficult and often wrong; "prescription," therefore, is inadequate and also additionally difficult because of lack of "wonder cures," and "remedy" is rarely forthcoming. The comprehensive tracking system, you see, is a hoax without foundation. Cf. *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967).

[40] See *Hobson, supra.*

[41] See preceding article.

[42] Rist, "Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education," 40 Harv. Ed. Rev. (August, 1970).

[43] See, e.g., Hall, "On the Road to Educational Failure: A Lawyer's Guide to Tracking," 5 *Inequality in Education* 1, 6 (1970).

EXCLUSION OF CHILDREN

10/12

Exclusion: Retarded Children

I. A

/a.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN, NANCY BETH BOWMAN, et al. :

Plaintiffs :

v. : CIVIL ACTION NO. 71-42

COMMONWEALTH OF PENNSYLVANIA, DAVID H. KURTZMAN, et al. :

ORDER, INJUNCTION and CONSENT AGREEMENT

AND NOW, this 7th day of October, 1971, the parties having consented through their counsel to certain findings and conclusions and to the relief to be provided to the named plaintiffs and to the members of their class, the provisions of the Consent Agreement between the parties set out below are hereby approved and adopted and it is hereby so ORDERED.

And for the reasons set out below it is ORDERED that defendants the Commonwealth of Pennsylvania, the Secretary of the Department of Education, the State Board of Education, the Secretary of the Department of Public Welfare, the named defendant school districts and intermediate units and each of the School Districts and Intermediate Units in the Commonwealth of Pennsylvania, their officers, employees, agents and successors be and they hereby are enjoined as follows:

(a) from applying Section 1304 of the Public School Code of 1949, 24 Purd. Stat. Sec. 1304, so as to postpone or in anyway to deny to any mentally retarded child access to a free public program of education and training;

(b) from applying Section 1326 or Section 1330(2) of the School Code of 1949, 24 Purd. Stat. Secs. 13-1326, 13-1330(2) so as to postpone, to terminate or in anyway to deny to any mentally retarded child access to a free public program of education and training;

(c) from applying Section 1371(1) of the School Code of 1949, 24 Purd. Stat. Sec. 13-1371(1) so as to deny to any mentally retarded child access to a free public program of education and training;

(d) from applying Section 1376 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1376, so as to deny tuition or tuition and maintenance to any mentally retarded person except on the same terms as may be applied to other exceptional children, including brain damaged children generally;

(e) from denying homebound instruction under Section 1372(3) of the School Code of 1949, 24 Purd. Stat. Sec. 13-1372(3) to any mentally retarded child merely because no physical disability accompanies the retardation or because retardation is not a short-term disability.

(f) from applying Section 1375 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1375, so as to deny to any mentally retarded child access to a free public program of education and training;

(g) to immediately re-evaluate the named plaintiffs, and to accord to each of them, as soon as possible but in no event later than October 13, , 1971, access to a free public program of education and training appropriate to his learning capacities;

(h) to provide, as soon as possible but in no event later than September 1, 1972, to every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter, access to a free public program of education and training appropriate to his learning capacities;

(i) to provide, as soon as possible but in no event later than September 1, 1972, wherever defendants provide a pre-school program of education and training for children aged less than six years of age, access to a free public program of education and training appropriate to his learning capacities to every mentally retarded child of the same age.

The above Orders are entered as interim Orders only and without prejudice, pending notice, as described in Paragraph 3 below, to the class of plaintiffs and to the class of defendants determined in Paragraphs 1 and 2 below.

Any member of the classes so notified who may wish to be heard before permanent Orders are entered shall enter his appearance and file a written statement of objections with the Clerk of this Court on or before October 20, 1971. Any objections so entered will be heard by the Court at 10:00 a.m.o'clock on October 22, 1971.

/s/ Raymond J. Broderick
J.

/s/ Arlin M. Adams
J.

/s/ Thomas A. Masterson
J.

CONSENT AGREEMENT

The Complaint in this action having been filed on January 7, 1971, alleging the unconstitutionality of certain Pennsylvania statutes and practices under the Equal Protection Clause of the Fourteenth Amendment and certain pendent claims; a three-judge court having been constituted, after motion, briefing and argument thereon, on May 26, 1971; an Order and Stipulation having been entered on June 18, 1971, requiring notice and a due process hearing before the educational assignment of any retarded child may be changed; and evidence having been received at preliminary hearing on August 12, 1971;

Now, therefore, this 7th day of October, 1971, the parties being desirous of effecting an amicable settlement of this action, the parties by their counsel agree, subject to the approval and Order of this Court, as follows:

I.

1. This action may and hereby shall be maintained by plaintiffs as a class action on behalf of all mentally retarded persons, residents of the Commonwealth of Pennsylvania, who have been, are being, or may be denied access to a free public program of education and training while they are, or were, less than twenty-one years of age.

It is expressly understood, subject to the provisions of Paragraph 44 below, that the immediate relief hereinafter provided shall be provided to those persons less than twenty-one years of age as of the date of the Order of the Court herein.

2. This action may and hereby shall be maintained against defendant school districts and intermediate units as a class action against all of the School Districts and Intermediate Units of the Commonwealth of Pennsylvania.

3. Pursuant to Rule 23, Fed. R. Civ. P., notice of the extent of the Consent Agreement and the proposed Order approving this Consent Agreement, in the form set out in Appendix A, shall be given as follows:

(a) to the class of defendants, by the Secretary of Education, by mailing immediately a copy of this proposed Order and Consent Agreement, to the Superintendent and the Director of Special Education of each School District and Intermediate Unit in the Commonwealth of Pennsylvania;

(b) to the class of plaintiffs, (i) by the Pennsylvania Association for Retarded Children, by immediately mailing a copy of this proposed Order and Consent Agreement to each of its Chapters in fifty-four counties of Pennsylvania; (ii) by the Department of Justice, by causing an advertisement in the form set out in Appendix A, to be placed in one newspaper of general circulation in each County in the Commonwealth; and (iii) by delivery of a joint press release of the parties to the television and radio stations, newspapers, and wire services in the Commonwealth.

II.

4. Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the

remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

5. The Commonwealth of Pennsylvania has undertaken to provide a free public education to all of its children between the ages of six and twenty-one years, and, even more specifically, has undertaken to provide education and training for all of its exceptional children.

6. Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.

7. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

III.

Section 1304

8. Section 1304 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1304, provides:

> "Admission of beginners
>
> The admission of beginners to the public schools shall be confined to the first two weeks of the annual school term in districts operating on an annual promotion basis, and to the first two weeks of either the first or the second semester of the school term to districts operating on a semi-annual promotion basis. Admission shall be limited to beginners who have attained the age of five years and seven months before the first day of September if they are to be admitted in the fall, and to those who have attained the age of five years and seven months before the first day of February if they are to be admitted at the beginning of the second semester. The board of school directors of any school district may admit beginners who are less than five years and seven months of age, in accordance with standards prescribed by the State Board of Education. The board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years, as determined by the supervisor of special education or a properly certificated public school psychologist in accordance with standards prescribed by the State Board of Education.
>
> 'The term 'beginners, as used in this section, shall mean any child that should enter the lowest grade of the primary school or the lowest primary class above the kindergarten level."

9. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees, agents, and successors agree that they shall cease and desist from applying Section 1304 so as to postpone or in any way to deny access to a free public program of education and training to any mentally retarded child.

10. The Attorney General of the Commonwealth of Pennsylvania (hereinafter "the Attorney General") agrees to issue an Opinion declaring

that Section 1304 means only that a school district may refuse to accept into or to retain in the lowest grade of the regular primary school or the lowest regular primary class above the kindergarten level, any child who has not attained a mental age of five years.

11. The Attorney General of the Commonwealth of Pennsylvania shall issue an Opinion thus construing Section 1304, and the State Board of Education (hereinafter "the Board") shall issue regulations to implement said construction and to supersede Sections 5-200 of the Pupil Attendance Regulations, copies of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

12. The aforementioned Opinion and Regulations shall (a) provide for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971, before a child's admission as a beginner in the lowest grade of a regular primary school, or the lowest regular primary class above kindergarten, may be postponed; (b) require the automatice re-evaluation every two years of any educational assignment other than to a regular class, and (c) provide for an annual re-evaluation at the request of the child's parent or guardian, and (d) provide upon each such re-evaluation for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971.

13. The aforementioned Opinion and Regulations shall also require the timely placement of any child whose admission to regular primary school or to the lowest regular primary class above kindergarten

is postponed, or who is not retained in such school or class, in a free public program of education and training pursuant to Sections 1371 through 1382 of the School Code of 1949, as amended 24 Purd. Stat. Sec. 13-1371 through Sec. 13-1382.

Section 1326

14. Section 1326 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1326, provides:

> "Definitions
>
> The term 'compulsory school age,' as hereinafter used shall mean the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years. The term shall not include any child who holds a certificate of graduation from a regularly accredited senior high school."

15. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1326 so as to postpone, to terminate, or in any way to deny access to a free public program of education and training to any mentally retarded child.

16. The Attorney General agrees to issue an Opinion declaring that Section 1326 means only that parents of a child have a compulsory duty while the child is between eight and seventeen years of age to assure his attendance in a program of education and training; and Section 1326 does not limit the ages between which a child must be granted access to a free,

public program of education and training. Defendants are bound by Section 1301 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1301, to provide free public education to all children six to twenty-one years of age. In the event that a parent elects to exercise the right of a child six through eight years and/or seventeen through twenty-one years of age to a free public education, defendants may not deny such child access to a program of education and training. Furthermore, if a parent does not discharge the duty of compulsory attendance with regard to any mentally retarded child between eight and seventeen years of age, defendants must and shall take those steps necessary to compel the child's attendance pursuant to Section 1327 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1327, and related provisions of the School Code, and to the relevant regulations with regard to compulsory attendance promulgated by the Board.

17. The Attorney General shall issue an Opinion thus construing Section 1326, and related Sections, and the Board shall promulgate Regulations to implement said construction, copies of which Opinion and Regulations shall be filed with the Court and delivered to plaintiffs' counsel on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Section 1330(2)

18. Section 1330(2) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1330(2) provides:

> "Exceptions to compulsory attendance.
>
> The provisions of this action requiring regular attendance shall not apply to any child who:
>
> * * *

> (2) Has been examined by an approved mental clinic or by a person certified as a public school psychologist or psychological examiner, and has been found to be unable to profit from further public school attendance, and who has been reported to the board of school directors and excused, in accordance with regulations prescribed by the State Board of Education."

19. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units, each of them, for themselves, their officers, employees, agents, and successors agree that they shall cease and desist from applying Section 1330(2) so as to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child.

20. The Attorney General agrees to issue an Opinion declaring that Section 1330(2) means only that a parent may be excused from liability under the compulsory attendance provisions of the School Code when, with the approval of the local school board and the Secretary of Education and a finding by an approved clinic or public school psychologist orpsychological examiner, the parent elects to withdraw the child from attendance. Section 1330(2) may not be invoked by defendants, contrary to the parents' wishes, to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child. Furthermore, if a parent does not discharge the duty of compulsory attendance with regards to any mentally retarded child between eight and seventeen years of age, defendants must and shall take those steps necessary to compel the child's attendance pursuant to Section 1327 and related provisions of the School Code and to the relevant regulations with regard to compulsory attendance promulgated by the Board.

21. The Attorney General shall issue an Opinion so construing Section 1330(2) and related provisions and the Board shall promulgate Regulations to implement said construction and to supersede Section 5-400 of the Pupil Attendance Regulations, a copy of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiff on or before October 25, , 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Pre-School Education

22. Defendants, the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1371(1) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1371(1) so as to deny access to a free public program of education and training to any mentally retarded child, and they further agree that wherever the Department of Education through its instrumentalities, the School Districts and Intermediate Units, or the Department of Public Welfare through any of its instrumentalities provides a pre-school program of education and training to children below the age of six, they shall also provide a program of education and training appropriate to their learning capacities to all retarded children of the same age.

23. Section 1371(1) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1371(1), provides:

> "Definition of exceptional children; reports; examination
>
> (1) The term 'exceptional children' shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes."

24. The Attorney General agrees to issue an Opinion declaring that the phrase "children of school age" as used in Section 1371 means children aged six to twenty-one and also, whenever the Department of Education through any of its instrumentalities, the local School District, Intermediate Unit, or the Department of Public Welfare, through any of its instrumentalities, provides a pre-school program of education or training for children below the age of six, whether kindergarten or however so called, means all mentally retarded children who have reached the age less than six at which pre-school programs are available to others.

25. The Attorney General shall issue an Opinion thus construing Section 1371 and the Board shall issue regulations to implement said construction, copies of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Tuition and Tuition and Maintenance

26. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees,

agents and successors agree that they shall cease and desist from applying Section 1376 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1376, so as to deny tuition or tuition and maintenance to any mentally retarded person.

27. The Attorney General agrees to issue an Opinion, and the Council of Basic Education of the State Board of Education agrees to promulgate Regulations, construing the term "brain damage" as used in Section 1376 and as defined in the Board's "Criteria for Approval . . . of Reimbursement" so as to include thereunder all mentally retarded persons, thereby making available to them tuition for day school and tuition and maintenance for residential school up to the maximum sum available for day school or residential school, whichever provides the more appropriate program of education and training. Copies of the aforesaid Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiff on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

28. Defendants may deny or withdraw payments of tuition or tuition and maintenance whenever the school district or intermediate unit in which a mentally retarded child resides provides a program of special education and training appropriate to the child's learning capacities into which the child may be placed.

29. The decision of defendants to deny or withdraw payments of tuition or tuition and maintenance shall be deemed a change in educational assignment as to which notice shall be given and an opportunity for a hearing afforded as set out in this Court's order of June 18, 1971.

Homebound Instruction

30. Section 1372(3) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1372(3), provides in relevant part:

> "Standards; plans; special classes or schools
>
> * * *
>
> (3) Special Classes or Schools Established and Maintained by School Districts.
>
> . . . If . . . it is not feasible to form a special class in any district or to provide such education for any [exceptional] child in the public schools of the district, the board of school directors of the district shall secure such proper education and training outside the public schools of the district or in special institutions, or by providing for teaching the child in his home. . . ."

31. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officials, employees, agents and successors agree that they shall cease and desist from denying homebound instruction under Section 1372(3) to mentally retarded children merely because no physical disability accompanies the retardation or because retardation is not a short-term disability.

32. The Attorney General agrees to issue an Opinion declaring that a mentally retarded child, whether or not physicall disabled, may receive homebound instruction and the State Board of Education and/or the Secretary of Education agrees to promulgate revised Regulations and forms in accord therewith, superseding the "Homebound Instruction Manual" (1970) insofar as it concerns mentally retarded children.

33. The aforesaid Opinion and Regulations shall also provide:

(a) that homebound instruction is the least preferable of the programs of education and training administered by the Department of Education and a mentally retarded child shall not be assigned to it unless it is the program most appropriate to the child's capacities;

(b) that homebound instruction shall involve education and training for at least five hours a week;

(c) that an assignment to homebound instruction shall be re-evaluated not less than every three months, and notice of the evaluation and an opportunity for a hearing thereon shall be accorded to the parent or guardian, as set out in the Order of this Court dated June 18, 1971;

34. Copies of the aforementioned Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Section 1375

35. Section 1375 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1375, provides:

> 'Uneducable children provided for by Department of Public Welfare
>
> 'The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certified as a public school psychologist as being uneducable and untrainable

> "In the public schools, may be reported by the board of school directors to the Superintendent of Public Instruction and when approved by him, in accordance with the standards of the State Board of Education, shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public schools. When a child is thus certified, the public schools shall be relieved of the obligation of providing education or training for such child. The Department of Public Welfare shall thereupon arrange for the care, training and supervision of such child in a manner not inconsistent with the laws governing mentally dective individuals."

36. Defendants the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, and the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1375 so as to deny access to a free public program of education and training to any mentally retarded child.

37. The Attorney General agrees to issue an Opinion declaring that since all children are capable of benefiting from a program of education and training, Section 1375 means that insofar as the Department of Public Welfare is charged to "arrange for the care, training and supervision" of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the capacities of that child.

38. The Attorney General agrees to issue an Opinion declaring that Section 1375 means that when it is found, on the recommendation of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education, as reviewed in the due process

hearing as set out in the Order of this Court dated June 18, 1971, that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than he would from any program of education and training administered by the Department of Education, he shall be certified to the Department of Public Welfare for placement in a program of education and training.

39. To assure that any program of education and training administered by the Department of Public Welfare shall provide education and training appropriate to a child's capacities the plan referred to in Paragraph 49 below shall specify, inter alia,

(a) the standards for hours of instruction, pupil-teacher ratios, curriculum, facilities, and teacher qualifications that shall be met in programs administered by the Department of Public Welfare;

(b) the standards which will qualify any mentally retarded person who completes a program administered by the Department of Public Welfare for a High School Certificate or a Certificate of Attendance as contemplated in Sections 8-132 and 8-133 of the Special Education Regulations;

(c) the reports which will be required in the continuing discharge by the Department of Education of its duty under Section 2809(1) of the Administrative Code of 1929, as amended, 71 Purd. Stat. Sec. 2809(1), to inspect and to require reports of programs of education and training administered by the Department of Public Welfare, which reports shall include, for each child in such programs an annual statement of educational strategy (as defined in Section 8-123 of the Special Education Regulations) for the coming year and at the close of the year an evaluation of that strategy;

(d) that the Department of Education shall exercise the power under Section 1926 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 19-1926 to supervise the programs of education and training in all institutions wholly or partly supported by the Department of Public Welfare, and the procedures to be adopted therefor.

40. The Attorney General agrees to issue an Opinion so construing Section 1375 and the Board to promulgate Regulations implementing said construction, which Opinion and Regulations shall also provide:

(a) that the Secretary of Education shall be responsible for assuring that every mentally retarded child is placed in a program of education and training appropriate to his learning capacities, and to that end, by Rules of Procedure requiring that reports of the annual census and evaluation, under Section 1371(2) of the School Code of 1949, as amended, 24 Purd. Stat. 13-1371(2), be made to him, he shall be informed as to the identity, condition, and educational status of every mentally retarded child within the various school districts.

(b) that should it appear that the provisions of the School Code relating to the proper education and training of mentally retarded children have not been complied with or the needs of the mentally retarded child are not being adequately served in any program administered by the Department of Public Welfare, the Department of Education shall provide such education and training pursuant to Section 1372(5) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1372(5).

(c) that the same right to notice and an opportunity for a hearing as is set out in the Order of this Court of June 18, 1971, shall be accorded on any change in educational assignment among the programs of education and training administered by the Department of Public Welfare.

(d) that not less than every two years the assignment of any mentally retarded child to a program of education and training administered by the Department of Public Welfare shall be re-evaluated by the Department of Education and upon such re-evaluation, notice and an opportunity to be heard shall be accorded as set out in the Order of this Court, dated June 18, 1971.

40. Copies of the aforesaid Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

IV.

41. Each of the named plaintiffs shall be immediately re-evaluated by defendants and, as soon as possible, but in no event later than October 13, 1971, shall be accorded access to a free public program of education and training appropriate to his learning capacities.

42. Every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

43. Wherever defendants provide a pre-school program of education and training for children less than six years of age, whether kindergarten

or howsoever called, every mentally retarded child of the same age as of the date of this Order and hereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

44. The parties explicitly reserve their right to hearing and argument on the question of the obligation of defendants to accord compensatory educational opportunity to members of the plaintiff class of whatever age who were denied access to a free public program of education and training without notice and without a due process hearing while they were aged six years to twenty-one years, for a period equal to the period of such wrongful denial.

45. To implement the aforementioned relief and to assure that it is extended to all members of the class entitled to it, Herbert Goldstein, Ph.D. and Dennis E. Haggerty, Esq. are appointed Masters for the purpose of overseeing a process of identification, evaluation, notification, and compliance hereinafter described.

46. Notice of this Order and of the Order of June 18, 1971, in form to be agreed upon by counsel for the parties, shall be given by defendants to the parents and guardian of every mentally retarded person, and of every person thought by defendants to be mentally retarded, of the ages specified in Paragraphs 42 and 43 above, now resident in the Commonwealt of Pennsylvania, who while he was aged four years to twenty-one years was not accorded access to a free public program of education and training, whether as a result of exclusion, postponement, excusal, or in any other fashion, formal or informal.

47. Within thirty days of the date of this Order, defendants shall formulate and shall submit to the Masters for their approval a satisfactory plan to identify, locate, evaluate and give notice to all the persons described in the foregoing paragraph, and to identify all persons described in Paragraph 44, which plan shall include, but not be limited to, a search of the records of the local school districts, of the intermediate units,

of County MH/MR units, of the State Schools and Hospitals, including the waiting lists for admission thereto, and of interim care facilities, and, to the extent necessary, publication in newspapers and the use of radio and television in a manner calculated to reach the persons described in the foregoing paragraph. A copy of the proposed plan shall be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

48. Within ninety days of the date of this Order, defendants shall identify and locate all persons described in paragraph 46 above, give them notice and provide for their evaluation, and shall report to the Masters the names, circumstances, the educational histories and the educatio diagnosis of all persons so identified.

49. By February 1, 1972, defendants shall formulate and submit to the Masters for their approval a plan, to be effectuated by September 1, 1972, to commence or recommence a free public program of education and training for all mentally retarded persons described in Paragraph 46 above and aged between four and twenty-one years as of the date of this Order, and for all mentally retarded persons of such ages hereafter. The plan shall specify the range of programs of education and training, there kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children, where they shall be conducted, arrangements for their financing, and, if additional teachers are found to be necessary, the plan shall specify recruitment, hiring, and training arrangements. The plan shall specify such additional standards and procedures, including but not limited to those specified in Paragraph 39 above, as may be consistent with this Order and necessary to its effectuation. A copy of the proposed plan will be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

50. If by September 1, 1972, any local school district or intermediate unit is not providing a free public education to all mentally retarded persons 4 to 21 years of age within its responsibility, the

Secretary of Education, pursuant to Section 1372(5) of the Public School Code of 1949, 24 Purd. Stat. 1372(5) shall direct provide, maintain, administer, supervise, and operate programs for the education and training of these children.

51. The Masters shall hear any members of the plaintif class who may be agrrieved in the implementation of this Order.

52. The Masters shall be compensated by defendants.

53. This Court shall retain jurisdiction of the matte until it has heard the final report of the Masters on or before October 15, 1972.

Thomas K. Gilhool
Thomas K. Gilhool
Attorney for Plaintiffs

J Shane Creamer
J. Shane Creamer
Attorney General

Ed Weintraub
Deputy Attorney General
Attorneys for Defendants

Acknowledged:

Dr. David H. Kurtzman
Secretary of Education

Dr. William F. Ohrtman
Director, Bureau of
Special Education

Mrs. Helene Wohlgemuth
Secretary of Public Wel

Edward R. Goldman
Commissioner of Mental
Retardation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION FOR :
RETARDED CHILDREN;
NANCY BETH BOWMAN, ET AL.

Plaintiffs :

v. CIVIL ACTION
NO. 71-42

COMMONWEALTH OF PENNSYLVANIA, :
DAVID H. KURTZMAN, ET AL.

Defendants :

ORDER

AND NOW, this 18th day of June, 1971, the parties having entered into the attached Stipulation, the Stipulation is approved by this Court, and it is hereby so Ordered.

J.

J.

Arlin M. Adams
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION FOR :
RETARDED CHILDREN,
NANCY BETH BOWMAN, ET AL. :

Plaintiffs :

: Civil Action No.
v. 71-42

COMMONWEALTH OF PENNSYLVANIA, :
DAVID H. KURTZMAN, ET AL.

Defendants :

STIPULATION

Subject to the approval and order of the Court, it is agreed by the parties that:

1. Definitions

(a) "Change in educational status" shall mean an assignment or re-assignment based on the fact that the child is mentally retarded or thought to be mentally retarded to one of the following educational assignments: Regular Education, Special Education or to no assignment, or from one type of special education to another.

(b) "Department" shall mean the Pennsylvania Department of Education.

(c) "School District" shall mean any school district in the Commonwealth of Pennsylvania.

(d) 'Intermediate Unit" shall mean the intermediate units as provided by the Pennsylvania School Code.

(e) 'Regular Education" shall mean education other than special education.

(f) 'Special Education" shall mean special classes, special schools education and training secured by the local school district or intermediate unit outside the public schools or in special institutions, instruction in the home and tuition reimbursement, as provided in 24 Purd. Stat. Sec. 13-1371 through 13-1380.

2. No child, aged 5 years, 6 months through 21 years, who is mentally retarded or who is thought by any school official, the intermediate unit, or by his parents or guardian to be mentally retarded, shall be subjected to a change in educational status without first being accorded notice and the opportunity of a due process hearing as hereinafter prescribed. This provision shall also apply to any child who has never had an educational assignment.

3. Within 30 days of the approval of this Stipulation by the court herein, the State Board of Education shall adopt regulations, and shall transmit copies thereof to the superintendents of the school districts and interemediate units, the Members of their Boards, and their counsel, which regulations shall incorporate paragraph 1 above and otherwise shall provide as follows:

(a) Whenever any mentally retarded or allegedly mentally retarded child, aged five years, six months, through twenty-one years, is recommended for a change in educational status by a school district, intermediate unit or any school official, notice of the proposed action shall first be given to the parent or guardian of the child.

(b) Notice of the proposed action shall be given in writing by registered mail to the parent or guardian of the child.

(c) The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor, including specification of any tests or reports upon which such action is proposed.

(d) The notice shall advise the parent or guardian of any alternative education opportunities, if any, available to his child other than that proposed.

(e) The notice shall inform the parent or guardian of his right to contest the proposed action at a full hearing before the Secretary of Education, or his designee, in a place and at a time convenient to the parent, before the proposed action may be taken.

(f) The notice shall inform the parent or guardian of his right to be represented at the hearing by legal counsel, of his right to examine before the hearing his child's school records including any tests or reports upon which the proposed action may be based, of his right to present evidence of his own, including expert medical, psychological, and educational testimony, and of his right to confront and to cross-examine any school official, employee, or agent of a school district, intermediate unit or the department who may have evidence upon which the proposed action may be based.

(g) The notice shall inform the parent or guardian of the availabilit of various organizations, inclduing the local chapter of the Pennsylvania Association for Retarded Children, to assist him in connection with the hearing and the school district or intermediate unit involved shall offer to provide full information about such organization to such parent or guardian upon request.

(h) The notice shall inform theparent or guardian that he is entitled under the Pennsylvania Mental Health and Mental Retardation Act to the services of a local center for an independent medical, psychological and educational evaluation of his child and shall specify the name, address, and telephone number of the MH-MR center in his catchment area.

(i) The notice shall specify the procedure for pursuing a hearing, which procedure shall be stated in a form to be agreed upon by counsel, which form shall distinctly state that the parent or guardian must fill in the form and mail the same to the school district or intermediate unit involved within 14 days of the date of the notice.

(j) If the parent or guardian does not exercise his right to a hearing by mailing in the form requesting a hearing within 14 days of receipt of the aforesaid notice, the school district or intermediate unit involved shall send out a second notice in the manner prescribed by paragraphs 2(a)-2(i) above, which notice shall also distinctly advise the parent or guardian that he has a right to a hearing as prescribed above, that he had been notified once before about such right to a hearing, and that his failure to respond to the second notice within 14 days of the date thereof will constitute his waiver to a right to a hearing. Such second notice shall also be accompanied with a form for requesting a hearing of the type specified in paragraph (i) above.

(k) The hearing shall be scheduled not sooner than 20 days nor later than 45 days after receipt of the request for a hearing from the parent or guardian.

(l) The hearing shall be held in the local district and at a place reasonably convenient to the parent or guardian of the child. At the option of the parent or guardian, the hearing may be held in the evening and such option shall be set forth in the form requesting the hearing aforesaid.

(m) The hearing officer shall be the Secretary of Education, or his designee, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

(n) The hearing shall be an oral, personal hearing, and shall be public unless the parent or guardian specifies a closed hearing.

(o) The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.

(p) The local school district or intermediate unit shall have the burden of proof.

(q) A stenographic or other transcribed record of the hearing shall be made and shall be available to the parent or guardian or his representative. Said record may be discarded after three years.

(r) The parent or guardian of the child may be represented at the hearing by legal counsel of his choosing.

(s) The parent or guardian or his counsel shall be given reasonable access prior to the hearing to all records of the school district or intermediate unit concerning his child, including any tests or reports upon which the proposed action may be based.

(t) The parent or guardian or his counsel shall have the right to compel the attendance of, to confront and to cross-examine any witness testifying for the school board or intermediate unit and any official, employee, or agent of the school district, intermediate unit, or the department who may have evidence upon which the proposed action may be based.

(u) The parent or guardian shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(v) No later than 30 days after the hearing, the hearing officer shall render a decision in writing which shall be accompanied by written findings of fact and conclusions of law and which shall be sent by registered mail to the parent or guardian and his counsel.

(w) Pending the hearing and receipt of notification of the decision by the parent or guardian, there shall be no change in the child's educational status.

3. Defendant shall promptly submit the regulations adopted pursuant to paragraph 2 above to the plaintiffs and to thecourt and within 3 days of their delivery to the school districts and intermediate units shall file with the court and plaintiffs a statement of how and to whom said regulations and any covering statements were delivered.

4. Notice and the opportunity of a due process hearing, as set out in paragraph 2 above, shall be afforded on and after the effective date of the stipulation to every child who is mentally retarded or who is thought by any school official, the intermediate unit, or by his parents or guardian to be mentally retarded, before subjecting such child to a change in educational status as defined herein.

Stuart S. Bowie,
Deputy Attorney General
Counsel for Defendants

Thomas K. Gilhool
Counsel for Plaintiffs

Dated: June 18, 1971

APPENDIX A

NOTICE

To: (1) All parents and guardians of mentally retarded persons resident in the Commonwealth of Pennsylvania

(2) All school Districts and Intermediate Units in the Commonwealth of Pennsylvania

Notice is hereby given (1) that a proposed Order approving a Consent Agreement and issuing certain Injunctions in Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, E.D. Pa., C.A. No. 71-42, is on file with the Clerk of the United States District Court and available for inspection there and in the offices of the Superintendent of each School District and Intermediate Unit in the Commonwealth of Pennsylvania and of each County Chapter of the Pennsylvania Association for Retarded Children.

(2) That the above mentioned action, on behalf of all mentally retarded persons who have been denied access to a free, public program of education and training, was begun on January 7, 1971, raising certain procedural and substantive claims against the laws and practices of the Commonwealth of Pennsylvania, the Department of Education, the Department of Public Welfare, 12 named School Districts and Intermediate Units and the class of all School Districts and Intermediate Units in the Commonwealth, because of their failure to provide a free public education to all mentally retarded children.

(3) That the proposed Order would approve a Consent Agreement entered into by the named parties on October 7, 1971, providing that each mentally retarded child shall be accorded access to a program of

education and training, that notice and an opportunity for a hearing shall be accorded before any change in the educational assignment of mentally retarded children, that certain sections of the Public School Code shall be so construed, and that certain Regulations so providing shall be promulgated thereunder, and that a Special Master shall be appointed to oversee the identification by defendants of all mentally retarded children who have been denied an education and the formulation and implementation by defendants of a plan to provide a free, public program of education and training to all mentally retarded children as soon as possible and no later than September 1, 1972, and would also issue certain Injunctions consistent with the Consent Agreement.

(4) That the parents or guardian of any mentally retarded child or any school district or intermediate unit who may wish to make an objection to the Proposed Order approving the Consent Agreement may do so by entering an appearance and filing a statement of objections with the Clerk of the United States District Court for the Eastern District of Pennsylvania, 9th and Chestnut Streets, Philadelphia, on or before October 20, 1971. Hearing thereon shall be held before the Court at 10:00 o'clock A.M., October 22, 1971.

1. b.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION FOR :
RETARDED CHILDREN
NANCY BETH ~~BOWMAN~~, et al.
Plaintiffs : CIVIL ACTION
v. NO. 71-42

COMMONWEALTH OF PENNSYLVANIA, :
DAVID H. KURTZMAN, et al.
Defendants :

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO CONVENE A THREE COURT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION FOR :
RETARDED CHILDREN,
NANCY BETH BOWMAN, et al. :

Plaintiffs CIVIL ACTION
: NO. 71-42
v.

COMMONWEALTH OF PENNSYLVANIA, :
D. H. KURTZMAN, et al.

Defendants :

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO CONVENE A THREE COURT JUDGE

Plaintiffs seek, inter alia, to enjoin the enforcement of Pennsylvania statutes and regulations of statewide applicability on the ground that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to theConstitution of the United States.[1] Such a case must be heard by a three-judge court immediately convened pursuant to Title 28 U. S. C. Sections 2281 and 2284, unless the constitutional issue is "plainly insubstantial." Ex parte Porsky, 290 U. S. 30, 32 (1933); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713, 715 (1962).

The Federal courts under direction of the United States Supreme Court have established a low threshhold for the convening of a three-judge court, holding that a constitutional issue is "plainly insubstantial" only if it is:

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[1] In addition to contesting, on two grounds, the constitutionality of Sections 1304 and 1375 of the Pennsylvania School Code, and the regulations promulgated thereunder, particularly Sections 5-400 and 5-220 of the Pupil Attendance Regulations of the State Board of Education, plaintiffs also challenge (1) the construction as a pendent matter of Sections 1330 and 1336 of the School Code and (2) the constitutionality of defendants' practices, applying the cited statutory provisions and otherwise, arbitrarily and capriciously denying to plaintiffs the opportunity of an education. Determination of this fast claim, of itself, probably also requires a three

> "obviously without merit or . . . its unsoundness so clearly results from the previous decisions of the [Supreme] court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Blass v. Weigel, 85 F. Supp. 775, 779 (D. N. J. 1949), citing California Water Service Co. v. Redding, 304 U. S. 252, 255 (1937). See also Bailey v. Patterson, 369 U.S. 31, 33 (1962)(three-judge court may be denied only where claim is "wholly insubstantial, legally speaking non-existent"). The question of substantiality is to be determined from the pleadings and the three judge court is to be convened irrespective of the judge's own view of the ultimate merits of the case. Carras v. Monaghan, 65 F. Supp. 658, 661 (W. D. Pa. 1946). The assertion of non-constitutional claims along with a non-frivolous constitutional attack does not remove a case from the operation of Section 2281; the three judge court has jurisdiction over all grounds of attack and may properly adjudicate all of the claims raised. Florida Lime & Avacado Flowers, Inc. v. Jacobson, 362 U.S. 73, 80-81 (1960). Cf. Zemel v. Rusk, 381 U.S. 1, 6 (1965).

The only question before the Court, therefore, is whether the constitutional claims presented by plaintiffs are "wholly and plainly insubstantial" or "obviously without merit." Clearly, as the decision of the Second Circuit Court of Appeals in McMillan v. Board of Education of the State of New York, 430 F. 2d 1145 (2d Cir. 1970) (per Friendly, C.J.) and the following

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judge court. Compare Dept. of Employment v. U. S., 385 U. S. 355, 357 (1966) with Ex parte Bransford, 310 U. S. 354, 361 (1940). See also Query v. United States, 316 U.S. 486 (1942); Groff v. Wohlgemuth, C.A. No. 71-3340 (E. D. Pa. 1971) statement of this case show, plaintiffs' claims are far from insubstantial. Rather they are so substantial as to be compelling -- to require the convening of a three judge court,[2] to require the submission of the merits to that court, and, upon hearing, to require judgment in plaintiffs favor.

I. STATEMENT OF THE FACTS

The United States Supreme Court, in Brown v. Board of Education, 347 U.S. 483, 493 (1954), definitively stated the purposes of education:

> "[Education] is required in the performance of our most basis public responsibilities . . . . It is the very foundation of good citizenship. It is a principal instrument for awakening the child to cultural values, in preparing him for later . . . training, and in helping him to adjust normally to his environment. [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[3]

This appreciation of the purposes, and of the crucial importance, of public schooling is not peculiar to 1954; from Thomas Jefferson to the most recently written statutes, the purposes of education and its functions in our society have always been clear.

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[2] Among the cases in this Circuit where three judge courts have been convened, see Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967), aff'd. sub nom. Shapiro v. Thompson, 394 U.S. 618 (1969); Williford v. Laupheimer, 311 F. Supp. 720 (E.D. Pa. 1969); Caldwell v. Laupheimer, 311 F. Supp. 853 (E.D. Pa. 1969); Jenkins v. Georges, 312 F. Supp. 289 (W.D. Pa. 1969); Woods v. Miller, 312 F. Supp. 316 (W. D. Pa. 1970); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970); McElroy v. Santiago, 319 F. Supp. 284 (E.D. Pa. 1970).

[3] Compare the statement of the purposes of education forumulated by the Council for Exceptional Children, a department of the National Education Association, and the largest professional organization in special education. "Policy Statement: Basic Commitment; and Responsibilities to Exceptional Children", Journal of Exceptional Children (Feb. 1971), p. 424.

These purposes pertain with equal, even greater, force to retarded citizens. Absent a structured, formal opportunity to secure an education, the purposes will not likely be realized by retarded citizens at all; for them, development and learning is unlikely to come informally or by happenstance, as it does for so many others. And the consequences are considerably more severe for retarded citizens. Absent education the retarded citizen will be unable to provide for himself and may even be incapable of self-care and hence in jeopardy of institutionalization, loss of liberty, and even loss of life. If, as Justice Holmes wrote, education is, because of its high and pervasive purpose, "one of the first objects of public care", Interstate Consol. Ry. Co. v. Massachusetts, 207 U.S. 79, 87 (1907), those purposes and the circumstances of retarded children combine to require that the universal undertaking of the states to provide education for all extend, too, to all of the retarded.

Yet across the country approximately 60% of the children of school age who are retarded are not receiving an education. President's Committee on Mental Retardation, M.R. 69, Annual Report, p. 18. In Pennsylvania, 50,043 children are enrolled in special classes for the retarded. Yet, in Pennsylvania, there are at least 103,800 retarded children of school age -- as many as 53,400 children are not receiving an education.[4] The eleven named plaintiffs here are fairly representative, in every way, of these many children who have been denied access, formally and informally, in a great imaginative variety of ways, to public schooling. Their number can not yet be fully specified but in a 1968-69 Report, by way of example the Director of Special Education of the Philadelphia School District estimated there were 58,000 retarded children of school age in Philadelphia of whom

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[4] The estimate of the number of retarded children in Pennsylvania is based upon the Stedman-Sherwood incidence index (1967).

8,040 were in special classes. On January 1, 1968, 426 retarded children were on waiting lists for special classes in Philadelphia. *Report of the Collaborative Study of Educational Programs for Handicapped Children* (Dec. 1968) p. 46. The 1965 State Plan[5] admits to 20,000 retarded children not now served by public special education classes, and speaks ambiguously also of another "perhaps 80,000 . . . who do not fit into nursery classes or public school special education." Com. of Penna., *The Comprehensive Mental Retardation Plan* (Dec. 1965) p. 4.

The exclusion of these many retarded children from the schools in Pennsylvania and in the nation rests upon the myth that they are not educable. The myth has been embodied, *inter alia,* in state statutes, including those here contested, and in a pattern of practice, also contested here, that in arbitrary and irrational fashion withholds schooling from these children. And myth it is, or, more properly, fiction.

In fact, as Aubrey J. Yates, *Behavior Therapy* (1970) p. 324 recites,

> ". . . the pessimistic views, which have been so widely and for so long entertained regarding the ineducability of the mentally defective, are unwarranted."

The Council for Exceptional Children's recently proffered "Policy Statement: Basic Commitments and Responsibilities to Exceptional Children" underscores the same fact:

> "There is no divisiding line which excludes some children and includes others in educational programs.
>
> "Mentally retarded children of yesteryear who were excluded because they were 'unteachable' have recently become 'educable' or 'trainable.'"
> Journal of Exceptional Children (Feb. 1971) pp. 422, 429.

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[5] Required of the Commonwealth by the United States Department of Health, Education and Welfare under Public Law 88-156.

A careful review of recent literature and experience in the education of retarded children, Philip Roos, "Trends and Issues in Special Education for the Mentally Retarded", Education and Training of the Mentally Retarded, vol. 5., No. 2 (April 1970), p. 51, concludes:

> "retarded children are . . . developing individuals with potential for growth and learning. Even the most profoundly retarded . . . have some capacity for development. The scope of special education [should and can] include all levels of retardation."

Compare, President's Committee on Mental Retardation, The Six Hour Retarded Child (1970) pp. 4, 17, stating the goal of a zero-reject, all inclusive educational system.

Expert opinion is universally of the same mind: there is no such thing as an uneducable child. Classification of children to the contrary, as by the statutes and practices challenged here, has no basis in reality.

In fact, of every 30 retarded citizens, 25, with education, are capable of achieving self-sufficiency in the sense of entering the ordinary labor market. Another 4, with education, are also capable of achieving self-sufficiency, though in employment in a sheltered environment. And one, with education, is capable of achieving self-care. See. e. g., Cohen, "Vocational Rehabilitation of the Mentally Retarded," Pediatric Clinics of North America, vol 15., No. 4, Nov. 1968, p. 1021; President's Committee on Mental Retardation, MR 69, Annual Report, p. 17. And see, the admission of the Commonwealth -- "severely retarded persons (with I.Q.'s of less than 35) can learn self-care and often even socially useful activities" -- at p. 92 of The Comprehensive Mental Retardation Plan (Dec. 1965). To continue the false classification is not only to frustrate the purposes of the fundamental state undertaking in education and to exact a heavy toll in liberty and in life from retarded citizens, but it is also to impose upon the state the great cost of the continued institutionalization of the uneducated retarded.[6]

At issue here is the constitutional rationality of the pervasive pattern of formal and informal exclusion from public schooling suffered by the eleven plaintiff children here named and the unnumbered children they represent. At issue is the constitutionality of Sections 1375 and 1304 of the Pennsylvania School Code, of the conduct grounded in those and in other statutory provisions, and of the unreasoned and unaccountable process of exclusion, itself hiding, or seeking to hide, the irrationality of the classification. Simply stated: (1) whether the Commonwealth may exclude retarded children from the public schools without notice and a prior due process hearing, and (2) whether the Commonwealth may separate out plaintiff retarded children while extending to all others a public education. These questions, substantial and compelling, as what follows will show, require a three judge court for their resolution.

II. ARGUMENT ON THE MERITS

A. The Exclusion of Plaintiffs from Public Schooling Without Notice and A Full Prior Hearing Denies Them The Due Process of the Law

Plaintiffs may not constituionally be excluded from the benefit of a public education without notice and a prior hearing.[7] As the United States Supreme Court said in Armstrong v. Manzo, 380 U.S. 545, 552 (1965), due process requires that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

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[6] Institutional care costs about $40,000 per bed in construction costs and yearly maintenance of the retarded ranges from $2000 to $10,000. Presidents Committee on Mental Retardation. These, Too, Must Be Equal: America's Needs in Habilitation and Employment of the Mentally Retarded (1969) p. 14. Compare the earnings potential of an estimated 2 million retarded persons capable of learning to support themselves but who have not yet been taught.

[7] At issue here is (1) the constitutionality of Section 1375 which authorizes the exclusion of children from the schools as "uneducable and untrainable" with no notice and without a prior hearing; (2) the constitutionality of Section 1304 which authorizes the postponement of admission of any child with a mental age under 5 years and of the Pupil Attending Regulations, Section 5-220, which provides for an "appeal to the Secretary of Education" -- never yet used -- but does not require notice of the right to a hearing, a statement of the basis of the postponement, or the opportunity to present evidence, to cross-examine, or to representation by counsel; and (3) the constitutionality of any exclusion, refusal to admit, or postponement of admission of any retarded child of school age, however formal or informal, with no notice and without a prior hearing.

The Court has repeatedly held that where a person's essential interests are at stake, final government action must await opportunity for a hearing. The alternative is to consign those interests to "the play and action of a purely personal and arbitrary power.' *Yick Wo v. Hopkins*, 118 U.S. 356 370 (1886). Thus, in the following circumstances, *inter alia*, due process has been held to require notice and a hearing before essential interests are disturbed by government action. *Armstrong v. Manzo*, 380 U.S. 545 (1965)(deprivation of parenthood); *Cole v. Young*, 351 U.S. 536 (1956) *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956) (dismissal from employment); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926)(accountant's qualifications to practice before the Board of Tax Appeals); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)9right to take bar examination). *Snaidach v. Family Finance Corp.*, 395 U.S. 337 (1969)(prejudgment garnishment). Most recently, in *Goldberg v. Kelly*, 397 U.S. 254 (1970)(public assistance benefits), the importance of a full hearing prior to termination of a benefit granted by the state was reaffirmed.[8]

That a public education is such a weighty interest as to require notice and a full hearing prior to deprivation is by now well settled. See, e.g., *Dixon v. Alabama State Boardof Education* 294 F. 2d. 150 (5th Cir. 1961) *cert denied*, 368 U.S. 930 (1961); *Woods v. Wright*, 334 F. 2d 369 (5th Cir. 1964); *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967); *Wasson v. Trowbridge*, 382 F. 2d 807 (2d Circuit 1967);

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[8] This District Court anticipated the Goldberg holding in *Caldwell v. Laupheimer*, 311 F. Supp. 853 (1969)(three judge court). And, similarly, this Court required a prior hearing in *Swarb v. Lennox*, 314 F. Supp. 1091 (1970) (confession of judgment) and *McElroy v. Santiago*, 319 F. Supp. 284 (1970) (distraint for rent)(both three judge courts).

Stricklin v. Regents of Univ. of Wisconsin, 297 F. Supp. 416 (W.D. Wis. 1969); *Scoville v. Board of Ed. of Joliet*, 286 F. Supp. 988 (N.D. Ill. 1969) *aff'd.* 415 F. 2d 860 (7th Cir. 1969) *rev'd en banc* _____ F. 2d ____ (1970); *Vought v. Van Buren Public Schools*, 306 F. Supp. 1388 (E.D. Mich. 1969)

Here, however, notice and a full prior hearing is even more critical than it was in any of the above cited cases. Here, the state not only deprives plaintiffs of the benefit of public education, but it also (1) stigmatizes plaintiff children forever as mentally defective, uneducable, untrainable, not yet five years mentally, or unable to profit from further schooling and (2) deprives them of their last and necessary chance to secure whatever blessings of liberty and life their talents might, with education, bring. Together these two facts mean that the state in excluding plaintiff children from the public schools renders them inevitably wards of the state or of their family, forever the subjects of ridicule or pity, but never free and self-sufficient. How much more serious is the "lifetime stigma", how much more "drastic the action", than that which flows from a record of disciplinary expulsion for distributing political magazines which contain a few untoward words. Cf. *Vought v. Van Buren Public Schools*, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).

Recently, the United States Supreme Court considered the necessity of a full due process hearing before the state stigmatizes any citizen. *Wisconsin v. Constantineau*, 39 U.S. Law Wk. 4128 (January 19, 1971). There the police, without notice to her or a prior hearing, had posted a notice in all retail liquor establishments forbidding sales to Mrs. Constantineau because of her "excessive drinking". The Court wrote:

> "The only issue present here is whether the label or characterization given a person by 'posting', though a mark of illness to some, is to others such a stigma or badge of disgrace that procedural due process requires ntocie and an opportunity to be heard. We agree with the district court that the private interest is such that those requirements . . . must be met."

> "It is significant that mostof the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
>
> "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."

The labels here - "uneducable and untrainable", "subject to the laws for mental defectives","not yet attained a mental age of five years", "unable to profit from further public school attendance" -- can have only a more severe effect on the young andimpressionable child than the posting of "excessive drunkeness" on an adult. Furthermore, to deprive a child of the fundamental right of education, rather than the mixed privilege of access to alcohol, is a far more severe deprivation.

In circumstances similar to those here, exclusion for otherwise unspecified "medical reasons", another federal district court in Wisconsin ordered the named plaintiff and the class of all medically excluded children reinstated in public schools and ordered further that a full due process hearing be held prior to any future exclusions. Marlega v. Board of School Directors of Milwaukee, C.A. No. 70-C-8 (E.D. Wis., Sept. 18, 1970).[9] The court directed that a due process hearing must include specification of the reasons for exclusion, a prior hearing, the right to be represented by counsel, to confront and cross-examine witnesses, and to present evidence and witnesses on the child's behalf, a stenographic record of the hearing, a final decision in writing stating in detail the reasons for any exclusion and specifiaction of available public education alternatives. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970); Caldwell v. Laupheimer, 311 F. Supp. 853 (E.D. Pa. 1969).[9]

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[9] On February 25, 1971, in another related case, a three judge federal court denied a motion to dismiss in Stewart v. Phillips, C.A. No. 70-1199-F (D. Mass.), where plaintiffs are seeking to enjoin their designation as "mentally retarded" and their placement in special classes without notice and an opportunity for a prior, full due process hearing.

The failure to provide notice and a full hearing before excluding plaintiff retarded children from the public schools and thus so vitally affecting their fundamental interests constitutes a denial of the process due each plaintiff and every member of the class they represent. Sections 1375 and 1304 of the Pennsylvania School Code and Section 5-220 of the Pupil Attendance Regulations and the action of defendants in any way excluding retarded children from the schools without notice and a prior hearing are unconstitutional.

Plaintiffs have stated not only a substantial claim but a compelling one. Certainly, a three judge court must be convened. And further, the deprivation of the constitutional right to due process alone warrants immediate readmission of plaintiff retarded children to public schooling, see e.g., *Dixon*, *Woods*, *Vought* and *Marlega*, *supra*, equitable recoupment of any money spent by plaintiffs' parents in any attempt to secure to their excluded children a private education, and compensatory education for the days, months and years the Commonwealth deprived plaintiffs of all educational opportunity. See *United States v. Jefferson County Bd. of Education*, 372 F 2d 836, 891-92, 900 (5th Cir. 1966) aff'd. *en banc*, 380 F. 2d 385 (1967); *Hobson v. Hansen*, 269 F.Supp. 401, 515 (D.C. 1967), *aff'd. sub nom* *Smuck v. Hansen*, 408 F. 2d. 175 (D.C. Cir. 1967).

B. The Exclusion from Public Schooling of Plaintiff Mentally Retarded Children Denies to Them The Equal Protection of the Law.

Opening argument for South Carolina before the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), John W. Davis said:

> "May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity." (**Emphasis** supplied).

Plaintiffs' argument here is much simpler. Plaintiffs do not here challenge the separation of special classes for retarded children from regular classes or the proper assignment of retarded children to special classes. Plaintiff retarded children raise only the question whether the state, having undertaken to provide public education to all of its children, including to all of its exceptional children, may deny it to plaintiffs entirely.

Sections 1301 and 1372 of the Pennsylvania School Code declare explicitly the Commonwealth's longstanding undertaking to provide public education to all children of school age. Yet at Section 1304 the School Code provides for the exclusion from school of children who have not yet attained a mental age of five, and at Section 1375, for the exclusion of "uneducable and untrainable" children. The constitutionality of each of these statutory provisions is here at issue. Retarded children have also been excluded from the schools under contorted and contrived applications of Section 1330(2), as "unable to profit from further public school attendance", and of Section 1326, as not yet eight years of age, and for even less specific and, in many cases, unknown reasons. The constitutionality of these practices is also at issue here. Stated simply, defendants have excluded plaintiff children from the public schools, failed to provide alternative public education, and thereby systematically deprived plaintiffs of an education while offering it freely to all other school children. The named plaintiffs are a class of children who have been deprived of all public education while a much larger class of children is offered an educational opportunity by the state. The central issue is whether such patently different treatment of two classes of children is justified under the applicable standard of review.

1. The Standard of Review Under the Equal Protection Clause

There is no doubt that the Equal Protection Clause applies to the state's actions in providing the opportunity ofpublic education to its residents. "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Education, 347 U.S. 483, 493 (1954).[10]

There appear, however, to be two standards under theEqual Protection Clause for reviewing state actions which result in differential treatment of two classes. Under the restrained standard of review, state statutes and practices are upheld if they fulfill any legitimate governmental purpose, and if the means chosen are rationally related to that purpose and are not arbitrary. E.g., Morey v. Doud, 354 U.S. 457, 465-66 (1957); McGowan v. Maryland, 366 U.S. 420, 426-28 (1961); Levy v. Louisiana, 391, U.S. 63 (1968). In contrast, classifications made by the state which are suspect(e.g., wealth or race) or which affect a fundamental interest (e.g., voting or travel) are subjected to strict scrutiny and upheld only if necessary to promote a compelling state interest. E.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 9 (1967); Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1960).

Although the strict standard of review is applicable in this, an education case, defendant's actions deny plaintiffs the equal protection of the laws under either standard, in three particulars: (1) by denying a public education altogether to plaintiff class while granting it to all others, apparently because plaintiffs are retarded; (2) by denying a public education altogether to plaintiffs while granting it to an approximately equal number of retarded children; (3) by denying an education altogether to the subclass of plaintiff children, who cannot afford private education, while granting education to all other children in the state.

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[10] Among the cases applying this principle to non-racial classifications in public education, see e.g., Hoosier v. Evans, 314 F. Supp. 316, 319-21 (D. St. Croix 1970); Alexander v. Thompson, 313 F. Supp. 1389, 1394 (C.D. Cal, 1970); Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967).

That the strict standard of review is applicable here scarcely requires argument. The encomiums to education are by now so familiar that extended discussion of its fundamentality would be misplaced here. Suffice to say, as the Court put it in Brown v. Board of Education, 347 U.S. 483, 493 (1954): "Education is perhaps the most important function of state and local governments."[11] Education effectively undergirds the exercise of all other basic rights: speech, association, travel and, as the circumstances of plaintiffs here clearly illustrate, liberty and life itself. Without education neither citizenship, nor self-realization, nor even gainful employment is in this day possible. One would be hard put, as the Court has noted, to conjure any right more fundamental in this day. Similarly, the Constitution of each state in the United States recognizes education as fundamental, so fundamental that the laws of all but three make education compulsory for at least ten year of each person's life.

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[11] The Brown Court did not discover the fundamentality of education. Mr. Justice Holmes' characterization of education as "one of the first objects of public-care" has been noted above. The Northwest Ordinance provided: Schools and the means of education shall forever be encouraged." Ordinance of 1787, Sec. 14 Art. 3. The Brown Court merely rehearsed a long evident fact: education is of the deepest importance to the development of every child. See, e.g., the statements of each of the last four Presidents: 1963 Code Cong. & Adm. N. 1450 (Kennedy); 1969 Code Cong. & Adm. N 2830 (Nixon); 1968 Code Cong. & Adm. N. 4648-49 (Johnson); 1965 Code Cong. & Adm. N. 1448-49 (Johnson); 1958 Code Cong. & Adm. N. 5412 (Eisenhower).

It is for these familiar reasons that in Hoosier v. Evans, 314 F. Supp. 316 (1970) the District Court in St. Croix, the other district court in this Circuit to face the issue, held that the interest in education is so fundamental that a classification which affects education must be subjected to the strict standard of review.[12]

Furthermore, children constitute a discrete and insular minority unable to protect their interests by participating in the usual political process and are therefore, traditional subjects for special protection by the judiciary. Retarded children, regarded historically with prejudice and subjected to discrimination, even more certainly constitute a discreet and insular minority to whom the usual political processes are not open. This, too, requires strict scrutiny of the classifications here challenged. United States v. Carolene Products, 304 U.S. 144, 155, N. 4 (1938).

Similarly, strict scrutiny is required because defendants' actions also result in a suspect wealth classification: plaintiff children must purchase whatever education they receive, while the state offers all other children a public education free.[13] For each and all of these reasons, this Court must strictly scrutinize any purpose proffered by the Commonwealth for excluding plaintiff children from public education and must exact of defendants a heavy burden of justification.

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[12] Among the cases in other Circuits so holding, see Hobson v. Hansen 269 F. Supp. 401, 507 (D. D. C. 1967) and Ordway v. Hargraves, C. A. No. 71-540-C (D. Mass. Mar. 11, 1971) ("It is beyond argument that the right to receive a public school education is a basic personal right or liberty.")

[13] The wealth classification does not bear even the superficial neutrality of the faulty wealth classifications in the criminal process and voting cases. E. g., Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1960). There all people were charged a uniform price for the transcript or the vote, but the differential effect on the indigent made for a suspect classification. Here one class of persons is required to pay for a private education while the state offers an education free to all others. Within the plaintiff class, of course, is the sub-class of plaintiffs unable to pay the purchase price of any private education, persons who are effectively denied an education altogether. Cf. Tate v. Short, 39 U.S. L. Wk. 4301 (March 2, 1971).

2. The Deprivation of Equal Protection of the Laws.

(a) By denying a public education altogether to plaintiffs while granting it to all others, the Commonwealth deprives them of the equal protection of the laws. Stripped of the surplusage of the applicable statutory language, and adding at least some reason where none has been given, the state's purported reason for excluding retarded children is that they are retarded.[14] At trial plaintiffs will present incontrovertible proof that each and every child is educable, capable of improving his skills and achieving a degree of self-sufficiency or self-care. Plaintiff children share in common with all other children this capacity for improvement of self with education. There is, despite Section 1375, no such thing as an "uneducable and untrainable" child. Thus the state's purported classifying fact, retardation, provides no rationale for the exclusion of plaintiffs from public education.

Rather, the reason for exclusion must be administrative convenience: an asserted inability of particular teachers and schools to educate plaintiff children. Such administrative convenience, however, is a means to an end, the education of children; it is not a legitimate purpose in and of itself. So far as administrative convenience resolves itself to finance, the reason for exclusion becomes the protection of the public fisc. While a state may legitimately seek to limit its expenditures, it may not accomplish such a purpose by invidious distinctions between classes of its citizens. It is not enough that a classification may save the state money. As the Court made patently clear in Shapiro v. Thompson, 394 U.S. 618, 633 (1969), the classification must also have some independently rational basis. This classification has none; it must fall.[15]

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[14] It might be asserted that the objectionable statutes and practices are targetted to exclude particular sorts of retarded children. As the evidence will show and as is argued at (b) below, if so, defendant's practices and their application of the statutes are, put mildly, wide of the mark, for virtually every member of the excluded class has a counterpart, similarly circumstanced, who is receiving public schooling. The more basic response, of course, is that argued here, that no child within the class of retarded children or among all children differs from the others, from the perspective o the purpose of public education: every child is educable. Each member of the excluded class has counterparts among others, similarly circumstanced, who are in some school and are learning.

The state's declared purpose, its only legitimate purpose, is the education of children. Where then is the legitimacy in excluding plaintiff children from public education altogether? As all plaintiff children are educable, where is the rational distinction between plaintiff children who are excluded and other children? As plaintiff children undeniably have a fundamental interest in their education, why is it necessary for the state to exclude plaintiff children from a public education altogether? If plaintiff children might slow the progress of quicker children, they may be placed in separate classes according to fair and accurate procedures, including adequate provision for review and assignment.[16] Many schools use more advanced students to assist in the education of the retarded, to the benefit of both. What compelling state interest, indeed, what interest at all, is promoted by the exclusion of plaintiff children?

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[15] The classification implicit in Section 1304, children ages 5 year 7 months with a mental age over five years, who are welcomed to school, and children aged 5 year 7 months with a mental age under 5, who are excluded, may be thought to rest on the proposition that retarded children will learn better later. All educational opinion is to the contrary. See., e.g, Dybwad & LaCrosse. "Early Childhood Education Is Essential to Handicapped Children." 18 J. of Nursery Educ. No. 2 (Jan. 1963); Dybwad, The Mentally Handicapped Child Under Five (1969). As the Policy Statement of the Council for Exceptional Children puts it, and it is no surprise in a decade where the value of earlier education has been generally realized and pursued:

> "Because of the exceptionality many children need to begin their school experience at an earlier age than is usual for children in our society . . . . Increasingly it is apparent that formal educational experiences at earlier levels would pay rich dividends. For the full development of the capabilities of . . . the mentally retarded . . . early educational programs are of critical importance." J. of Exceptional Children (Feb. 1971) pp. 421, 423.

From the perspective of the purposes of education, rationality directs that retarded children should begin earlier, not, as 1304 has it, later.

Furthermore, Section 1304 is patently arbitrary and irrational. First graders are not universally tested anywhere in Pennsylvania, but on a normal distribution of intelligence among first graders aged five years, 7 months or over, at least thirty percent will have mental ages under 5 years. So many students are, of course, not excluded from the schools. Rather a much smaller number are singled out willy-nilly -- perhaps the look on their face, or the color of their mother's coat when they come to register -- tested and excluded.

Rather than excluding plaintiff children altogether from public education, rationality and the Constitution require that Section 1372 be applied to all children. The Commonwealth must be enjoined to assure that each child has a public education available to him in the local school district, in special classes or schools for exceptional children, in special schools operated by the state, in approved schools outside the public schools, in special institutions or in homebound instruction. Having undertaken the responsibility to educate all its children, the state may not now be heard to demur invidiously, thereby depriving plaintiff class of the benefit of education

(b) By denying a public education altogether to plaintiff children, while granting it to an approximately equal number of retarded children, the Commonwealth deprives plaintiffs of the equal protection of the laws. So far as defendants might seek to justify the initial classification on the assertion that plaintiffs are retarded and thus different, the justification fails to explain why over 50,000 equally "different" children are being provided a public education.

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[16] In Washington, D. C., Judge Wright's order dissolving the existing track system led to the retesting of over [illegible], [illegible]72 children assigned to the special track. The tests revealed that almost two-thirds had been improperly classified. Smuck v. Hobson, 408 F. 2d. 175 (D.C. Cir. 1969). And see Stewart v. Philips, C.A. No. 70-1199-F (D. Mass. 1971).

Plaintiff children run the range of intelligence and skill among retarded children of comparable age, yet plaintiffs have been excluded from public education while similarly handicapped children have not. As the proof will show, virtually every member of the excluded class has a counterpart, similarly circumstanced, who is receiving public education. See, e.g., Note 15, *supra*. Surely, this unequal treatment of these two classes of children cannot be justified under either standard of review.

(c) By denying an education altogether to that subclass of plaintiff children, who cannot afford a private education, the Commonwealth deprives them of the equal protection of the laws. In addition, to the solicitude owed all members of plaintiffs' class, see page 15, *supra*, special judicial protection should be afforded to plainitff children whose parents are indigent. See Michelman, "Supreme Court, 1968, Term, Forward: Protecting the Poor Through theFourteenth Amendment," 83 Harv. L. Rev. 7 (1969). For this special class of children, the state's denial of all opportunity for an education is complete: these children will never receive any education at all because of their parents' indigency. For the indigent plaintiff, this is not merely a case of unconscionable and unequal treatment at the hands of the state: this is total deprivation of all opportunity for even a modicum of independence; self-care or self-sufficiency. Their mandated misery is foreshortened only by the accidents which result in their early death. The indigents in plaintiffs' class surely deserve a minimum of protection from this Court to avoid the disaster which otherwise will be their lot.[17]

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[17] Whether the ground for such concern for indigent plaintiffs' education, be due process or equal protection the result is the same: the provision of an opportunity for an education to indigent plaintiffs. In *Boddie v. State of Connecticut*, 37 U.S. L. Wk. 4294 (March 2, 1971), Mr. Justice Harlan's majority opinion holds that the denial of access to the courts to seek a divorce, because of the party's indigency and a filing fee, violates due process. Justices Brennan and Douglas, concurring, suggest that the denial of court access to the parties because of their indigency violates equal protection as well. *Griffin, Douglas, and Harper* and *Tate v. Short*, 37 U.S. L. Wk. 4301 -- decided the same day as *Boddie* and much like the matter here, concerned with poverty leading to institutionalization -- seem to suggest that equal protection ground is more appropriate. Michelman, *supra*, steers a middle course -- "minimum protection -- for the poor" cases.

3. McMillan v. Board of Education of the State of New York.

In a case not unlike the one now before theCourt, McMillan v. Board of Education of State of New York, 430 F. 2d. 1145 (1970), theCourt of Appeals for the Second Circuit overruled a district court's refusal to convene a three judge court and its dismissal of the complaint as to the State of New York. There the plaintiffs were brain injured children attending private school. Under New York law, if adequate facilities or instruction was not available in public schools, the state was authorized to pay up to $2,000 a year for each child in an approved private school. The plaintiffs, each of whom had to pay about $3,000 in private tuition, challenged the $2,000 limitation and the failure of defendants to provide public school classes adequate for plaintiff children. They sought an injunction to prohibit enforcement of the $2,000 ceiling and to require defendants to provide an adequate number of special classes.

On the filing of the complaint, two of the three original plaintiffs were admitted to special classes for the brain injured in the public schools. Two additional plaintiffs intervened, and one was immediately accepted into a special class in public school. (Note that in New York public schools special classes are maintained for brain injured children, while separate special classes are maintained for those, like plaintiffs here, who are mentally retarded.)

In reversing the dismissal of the complaint by thecourt below and its refusal to convene a three judge court, Judge Henry Friendly, not the least cautious or restrained member of the federal judiciary, held that the claims presented raised substantial questions of equal protection. Judge Friendly found that the New York law worked unfairly in many ways, particularly upon those children whose parents' indigency does not permit them to make any supplementary tuition payment at all. He specified two substantial constitutional questions:

> "is there rational basis for a ceiling lower than the cost that would have been incurred in maintaining the child in the most closely related type of public class?"

and, second, "lurking behind all this":

> "the unresolved claim that certain children who are qualified for the special classes, as the State asserts [the remaining plaintiffs] are not, are being kept out for lack of space and thereby forced to seek private education at a substantial expense to their parents not entailed for those who have been admitted."

These questions are not unlike the equal protection questions raised in this case. Here, as in McMillan, the equal protection claim is substantial, and a three judge court must be convened.

Whatever the standard, as the entire argument above indicates, plaintiffs have clearly stated a substantial, indeed a compelling, claim under the Equal Protection Clause. The classifications invoked by defendants in statute and in practice rest on grounds wholly irrelevant to the achievement of the state's purpose in undertaking public education. If the high purpose of public education is not to be frustrated, the classifications here challenged must be struck down and with them Sections 1304 and 1375 of the School Code. Once the state has undertaken to offer its children public education, it must provide each child the opportunity of public schooling in order to comply with the Constitutional command of equal protection of the laws.

The three-judge court must be convened and after hearing the relief sought must be granted. Here as in *Hoosier* and *Marlega*, in the student cases cited at p. , *supra*, and in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), defendants must be ordered immediately to grant access to public schooling to those who have been wrongfully deprived of it. If additional funds are required to pay for plaintiffs' public education, they must be raised or funds must be diverted from those already committed to the support of the education of all children. See., e.g., *Hoosier v. Evans*, 314 F. Supp. 316, 320 (D. St. Croix, 1970); *United States v. School District, 151 of Cook County*, 301 F. Supp. 201. 232 (N.D. Ill. 1969) *aff'd.* F. 2d. (7th Cir. 1970). *Griffin v. County School Board*, 377 U.S. 213 (1964); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

CONCLUSION

For the above stated reasons, a three-judge court must be convened, defendants' motion to dismiss denied, and upon hearing, in timely fashion, the relief requested by plaintiffs must be granted.

Respectfully submitted

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1.

DRAFT MEMORANDUM IN SUPPORT OF (1) DECLARATION OF DUE PROCESS RIGHTS AND DEPRIVATIONS THEREOF; AND (2) REMEDY BASED SOLELY ON DEPRIVATION OF DUE PROCESS RIGHTS

Defendants have excluded plaintiff children from all educational opportunity without any hearing. As a proximate result of such arbitrary exclusion, plaintiffs have been wrongfully denied the benefit of all publicly supported education opportunity for a substantial period of time, some for as long as the length of a normal public school career in elementary and secondary education. And there can be no doubt that defendants' exclusion of these plaintiffs without hearing from a public education althogether or from a particular public school (or basic program therein) was and is wrongful, a long-continuing denial of the fundamental process due every individual under our Federal Constitution. See, e.g., Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961); Woods v. Wright, 334 F.2d 369 (th Cir. 1964); Vought v. Van Buren Public Schools, 306 F.Supp. 1388 (E.D. Mich. 1969); Marlega v. Board of School Directors of Milwaukee, C.A. No. 70-C08 (E.D. Wisc., Sept. 18, 1970); Stewart v. Phillips, C.A. No. 70-1199-F (D. Mass., February 8, 1971); Stricklin v. Regents of Univ. of Wisconsin, 297 F.Supp. 416 (W.D. Wisc. 1969). See also, Wisconsin v. Constantineau, 91 S. Ct. 507, 39 U.S.L. Wk. 4128 (January 19, 1971), and discussion in Plaintiffs' Memorandum in Support of Their Motion to Convene a Three Judge Court at 7-11.

The day is long past when plaintiffs' rights should have been vindicated and their wrongful exclusion redressed. As noted by a unanimous Supreme Court, per Justice Goldberg,

> . . . Any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. Watson v. City of Memphis, 373 U.S. 526, 532-533 (1963) (Emphasis in original).

The same standard of timeliness now unquestionably applies in all variety of school cases as well. See Green v. County School Bd., 391 U.S. 430, 439 (1968) (segregation); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (segregation); Vought v. Van Buren Public Schools, supra (exclusion without hearing); Marlega v. Bd. of School Directors of Milwaukee, supra (exclusion without hearing); Ordway v. Hargraves, 323 F.Supp. 1155 (D. Mass. 1971) (exclusion for pregnancy); Hoosier v. Evans, 314 F.Supp. 316 (D. St. Croix 1970) (exclusion for "non-immigrant visitors"); Hobson v. Hansen, 327 F.Supp. 844 (D.D.C. 1971) (Per, Wright, Cir. J.) (Denial of equal access to objectively measurable education resources).

Compare Brown II, 379 U.S. 294 (1955) ("All deliberate speed").

Thus the violation of rights of named plaintiffs (and all others who have been wrongfully excluded from all public education by reason of the defendants' failure to provide the hearing due each such individual) is clear; and the passage of time has only aggravated the personal injury resulting from such wrongful denial of educational opportunity and the failure to redress the violation of constitutional rights. In such circumstances the Court has broad power to fashion an appropriate remedy that promises to work now:

> Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrong is broad, for breadth and flexibility are inherent in equitable remedies. Swann v. Charlotte-Mecklenberg, 402 U.S. 1, 16 (1971).

The immediate concerns are (1) providing named plaintiffs educational services to remedy the deprivation of all education for the period of wrongful exclusion, (2) determining which other members of plaintiff class also have been wrongfully excluded because denied due process; and (3) providing the same relief to these children as they are identified. In similar circumstances, Judge Weinstein invoked his broad equity power to insure that relief would be granted to all those wrongfully excluded from school by reason of the school authorities' failure to provide them a hearing, Knight v. Board of Education, 48 F.R.D. 108, 115 (E.D. N.Y. 1969).[1]

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[1] 670 students had been expelled from Lane High School in New York to relieve overcrowding. The standard for expulsion was 30 days or more absence in the previous semester and an unsatisfactory academic record in the previous school year. Although noting that such suspensions raised serious questions of equal protection, Judge Weinstein granted sweeping relief by way of preliminary injunction solely on the basis of the due process violation, i.e., the school authorities' failure to provide plaintiffs a hearing even if only on the standard set by the school. Immediate readmission and the provision of remedia services during the school day and the opportunity of a summer school program to make up for the wrongful exclusion was ordered. Each of the 670 students was granted this relief whether or not he was in fact absent for 30 days or more and had an unsatisfactory academic record in the previous year. The remed flowed solely from the violation of each student's due process right to a hearing; the violation of that right made every exclusion wrongful. The situation is exactly the same here for each member of the plaintiff class who has been excluded without a hearing. That violation of due process, standing alone makes every such exclusion wrongful and requires a complete remedy therefor. Only in this cause, the state-wide extent of the class, the number and variety of defendants, and the possible greater difficulty of identifying all members of plaintiff class make the implementation of relief somewhat more difficult. These factors call for even greater breadth and flexibility in the use of the

He ordered defendant school authorities (1) to readmit all students wrongfully excluded; (2) to make up for the wrongful exclusion by providing remedial assistance during the day and affording the opportunity of a summer school program; (3) and to mail a copy of the court's order to each member of the plaintiff class within 24 hours. Judge Weinstein, pursuant to Rule 53, F.R. Civ. P., also appointed a master--consisting of three educational experts--before whom any member of plaintiff class who felt aggrieved by the failure of the defendants to comply with the decree could bring his grievance and have a hearing.

Under the circumstances of the present cause, we respectfully submit that a similar order and procedure for vindicating plaintiffs' rights is here both appropriate and necessary. This Court should order that defendants

I. As to all children presently excluded,

(1) notify each person from 5 years, 7 months to 28 years of age excluded from school under color of statutes here under attack or by reason of any general or other expressions about inability to profit from education, and the like, of his rights under this order;
(2) make such notice personal, insofar as possible, by sending this order by registered mail to every excluded child within the knowledge of defendants;
(3) further, in order to notify members of plaintiffs' class not within the knowledge of the defendants, cause this order to be published and publicized in all appropriate media, including but not limited to, television, newspapers, radio and magazines throughout the state;
(4) readmit named plaintiffs to a public education opportunity now and thereafter for a period of time equivalent to the length of the wrongful exclusion;
(5) readmit all other children wrongfully excluded without a hearing

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(FN 1 con't) Court's broad equity powers to fashion effective relief. Compare U.S. v. Jefferson County Board of Education, 372 F.2d 836, 891-92, 900 (5th Cir. 1966) (per Wisdom, Cir. J.), aff'd en banc, 380 F.2d 385 (1967), where the model decree for all desegregation in the 5th Circuit required compensatory and remedial education services for all black children wrongfully excluded from "unitary" schools.

within 10 days after identification to a public education opportunity and thereafter for a period of time equivalent to the length of the wrongful exclusion;

(7) at such hearing (a) determine first whether the child has been wrongfully excluded because of the failure to provide an initial hearing prior to exclusion, or thereafter a periodic review of such excluded child's status; (b) upon finding no hearing upon initial exclusion, or no periodic review thereafter, pursuant to (5) supra, readmit such child within 10 days to a public education opprotunity and thereafter for a period of time equivalent to the length of the wrongful exclusion; (c) upon finding that the prior exclusion was not wrongful exclusion; (c) upon finding that the prior exclusion was not wrongful in that a full hearing was held upon exclusion and a periodic review of the excluded child's status made thereafter, hold a full hearing as set forth below;

(8) insure that the hearing for all those not wrongly excluded, (a) presume that the child is qualified and applying for readmission to a regular class; (b) set forth the bases for any other assignment or total exclusion in detail; (c) assign impartial designees of the superintendent of the district in which the child is resident as hearing examiner; (d) provide opportunity, at no cost to the child, for medical, psychologic and educational evaluation independent of the school system; (e) insure that the child and his next friend have opportunity to be represented by an advocate, including but not necessaril a lawyer, to present and rebut evidence, and to cross-examine witnesses; (f) make a record of the proceedings; (g) set forth with particularity the legal and factual basis for any decisio to assign the child to any program other than a regular class or exclude him entirely from all public education opportunity; (h) notify the child, next friend, and their advocate of any alternative services or educational opportunities, for which defendants believe he is qualified; (i) upon any determination other than total exclusion readmit the child into the appropriate program no later than the first day of the fall 1971 sc year;

II. As to all future reassignments from a regular class program to any othe or exclusion from a particular school or public education opportunity altogether:

(1) send notice to the guardian of each such child, such notice to include the proposed reassignments, the bases therefor, the opportunity of a full hearing, including representation by an advocate, presentation of evidence, opportunity for a full evaluation independent of the school system, opportunity to confront witness and contest evidence;

(2) hold a hearing as set forth in the notice provision above befor an impartial hearing examiner designated by the superintendent of the school system in which the child is now in attendance; said hearing examiner to notify next friend and advocate of the child of the programs for which qualified, and set forth the le

and factual bases for his determination in writing;
(3) reassign the child to the appropriate program and thereafter periodically review the child's status;
(4) offer the child reassigned or excluded by such decision within 10 days appeal to an impartial hearing examiner appointed by the State Superintendent, the decision to be reviewed as a matter of fact to determine whether substantial evidence supports the decision but denovo as to the application of law to those facts.

In addition, with respect only to those children presently excluded from education opportunity, pursuant to Rule 53, F.R. Civ. P., the Court should appoint two masters, one serving each half of the state, to hear any grievance claimed by plaintiffs to result from defendants' failure to fulfill the terms of this order. Any member of plaintiff class who deems himself so aggrieved may petition, simultaneously, the Court and the maste in his region (at the same time serving copies of said petition on State Defendant Kurzman and the superintendent of his district) setting forth in full his grievance. The master within 48 hours shall set the matter for hearing and notify plaintiffs and appropriate defendants of the time and pla for such hearing. The master shall provide opportunity for a full hearing and may require an independent evaluation of the child. The master shall hear all matters pertaining to any aspect of the grievance, and upon the evidence and law file findings of fact and conclusions of law and a propose order with the Court within ten days. Such decision shall be binding unles either the Court, plaintiff child, or defendant school authorities present objections to the Court within ten days after the filing of the master's findings of fact and conclusions of law.

Under the circumstances of this cause, we respectfully submit that suc order and procedure are required to permit the Court to grant full vindicat of each plaintiff's right to due process of law.

EXCLUSION: ALL EXCLUDED CHILDREN Mills v. Bd. of Ed. of D.C., C.A. No 19-71 (D.D.

Preliminary Statement

1. Plaintiffs are school age children who have been ex
entirely from the District of Columbia Public Schools and
present time are being denied a publicly-supported educati
the District of Columbia. Plaintiffs are predominantly bl
and poor and without financial means to obtain private inst
tion.

2. Plaintiffs have been denied admission to the Distric
Columbia Public Schools or have been excluded subsequent to
mission. Plaintiffs were so excluded without a formal dete
mination of the basis for their exclusion and without provi
for periodic review of their status. Plaintiff children me
have been labeled as behavioral problems, mentally retarded
emotionally disturbed or hyperactive. Plaintiffs can profi
from an education, whether in regular classrooms with suppo
services or in special classes adapted to their needs, and
to obtain such instruction.

3. Plaintiffs, as a result of Defendants' conduct, have
received an education for substantial periods of time. They
have been denied access to the District of Columbia Public S
and have not been provided with specialized instruction adap
to their needs in public or private schools.

4. Defendants deny plaintiffs a publicly-supported educa
while providing such an education for other school age child
in the District of Columbia.

5. Defendants' acts and practices in denying plaintiffs
equal educational opportunity violate the Fifth Amendment of
Constitution of the United States, the applicable statutes o
the District of Columbia, and the applicable Rules of the Bo
of Education of the District of Columbia. Plaintiffs seek
declaratory, preliminary and permanent injunctive relief to
prevent continued educational deprivation in violation of th

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Jurisdiction

6. The jurisdiction of this Court is invoked under 28 U
§§ 1331, 1343, 2201; 42 U.S.C. §1983, this being an action
for declaratory, preliminary and permanent injunctive relie
to redress the deprivation under color of law of rights,
privileges, and immunities secured to plaintiffs by the
Constitution and laws of the United States. The amount in
controversy exceeds Ten Thousand (10,000) Dollars.

Plaintiffs

7. PETER is twelve years old, black, and a committ
dependent ward of the District of Columbia resident at Juni
Village. He was excluded from the Brent Elementary School
March 23, 1971, at which time he was in the fourth grade.
Peter allegedly was a "behavior problem" and was recommende
approved for exclusion by the principal. Defendants have n
provided him with a full hearing or with a timely and adequa
review of his status. Furthermore, Defendants have failed t
provide for his reenrollment in the District of Columbia Pu
Schools or enrollment in private school. On information and
belief, numerous other dependent children of school attendan
age at Junior Village are denied a publicly-supported educat
Peter remains excluded from any publicly-supported education
[See attached Affidavits, Appendix A]

8. DUANE is thirteen years old, black, resid
at Saint Elizabeth's Hospital, Washington, D.C., and a depen
committed child. He was excluded from the Giddings Elementa
School in October, 1967, at which time he was in the third g
Duane allegedly was a "behavior problem." Defendants have n
provided him with a full hearing or with a timely and adequa
review of his status. Despite repeated efforts by his moth

Duane remained largely excluded from all publicly-supported education until February, 1971. Education experts at the Ch Study Center examined Duane and found him to be capable of returning to regular class if supportive services were provi Following several articles in the Washington Post and Washin Star, Duane was placed in a regular seventh grade classroom on a two-hour a day basis without any catch-up assistance an without an evaluation or diagnostic interview of any kind. Duane has remained on a waiting list for a tuition grant and now excluded from all publicly-supported education. [See attached Affidavit, Appendix B]

9. GEORGE , is eight years old, black, resid with his mother, at 601 Morton Street, N.W., Washington, D.C., and an AFDC recipient. George has never attended public school because of the denial of his applicat to the Maury Elementary School on the ground that he require a special class. George allegedly was retarded. Defendants have not provided him with a full hearing or with a timely a adequate review of his status. George remains excluded fro publicly-supported education, despite a medical opinion that is capable of profiting from schooling, and despite his moth efforts to secure a tuition grant from Defendants. [See att Affidavit, Appendix C]

10. STEVEN is eight years old, black, resident wit his mother, at 714 9th Street, N.E., Washington, and unable to afford private instruction. He has been exclu from the Taylor Elementary School since September, 1969, at which time he was in the first grade. Steven allegedly was slightly brain-damaged and hyperactive, and was excluded bec he wandered around the classroom. Defendants have not provi him with a full hearing or with a timely and adequate review his status. Steven was accepted in the Contemporary School,

a private school, provided that tuition was paid in full in advance. Despite the efforts of his parents, Steven has remained on a waiting list for the requisite tuition grant from Defendant school system and excluded from all publicly-support education. [See attached Affidavit, Appendix D]

11. MICHAEL is sixteen years old, black, resident at Saint Elizabeth's Hospital, Washington, D.C., and unable to afford private instruction. Michael is epileptic and allegedl slightly retarded. He has been excluded from the Sharpe Healt School since October, 1969, at which time he was temporarily hospitalized. Thereafter Michael was excluded from school because of health problems and school absences. Defendants have not provided him with a full hearing or with a timely and adequate review of his status. Despite his mother's efforts, and his attending physician's medical opinion that he could attend school, Michael has remained on a waiting list for a tuition grant and excluded from all publicly-supported educati [See attached Affidavit, Appendix E]

12. JANICE is thirteen years old, black, resident with her father, at 233 Anacostia Avenue, N.E., Washington, D.C., and unable to afford private instruction. S has been denied access to public schools since reaching compulsory school attendance age, as a result of the rejection of her application, based on the lack of an appropriate education program. Janice is brain-damaged and retarded, with right hemiplegia, resulting from a childhood illness. Defendants ha not provided her with a full hearing or with a timely and adequate review of her status. Despite repeated efforts by he parents, Janice has been excluded from all publicly-supported education. [See attached Affidavit, Appendix F]

13. JEROME is twelve years old, black, resident with his mother, at 2512 Ontario Avenue, N.W., Washingt D.C., and an AFDC recipient. Jerome is a retarded child and h

been totally excluded from public school. Defendants have not given him a full hearing or a timely and adequate review of his status. Despite his mother's efforts to secure either public school placement or a tuition grant, Jerome has remained on a waiting list for a tuition grant and excluded from all publicly supported education. [See attached Affidavit, Appendix 7]

14. The D.C. Family Welfare Rights Organization is a membership organization which acts to protect the interests of the poor, including committed dependent children. The D.C. Family Welfare Rights Organization represents three thousand families, many of whose children have been excluded from all publicly-supported education.

15. EASTER , DAISY , INA , MARVA , ARNOLD , and MARY sue on behalf of their above-named children as next friend. The D.C. FAMILY WELFARE RIGHTS ORGANIZATION, RONALD V. DELLUMS, and REV. FRED TAYLOR sue as next friends to Peter , a dependent committed ward of the District of Columbia.

The Class

16. Plaintiffs sue on their own behalf and, pursuant to Rule 23, F.R.Civ.P., on behalf of all other District of Columbia residents of school age who are eligible for a free public education and who have been excluded from such an education by Defendants or otherwise deprived by Defendants of access to publicly-supported education. The class is predominantly black and poor, and is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs will fairly and adequately protect the interests of the class and apprise the Court of claims typical to the class. In addition, prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual

members of the class which would establish incompatible standards of conduct for the local officials opposing the class and a risk of adjudications, with respect to individual members of the class, which would as a practical matter be dispositive of the interests of other members not parties to the adjudications and would substantially impair and impede their ability to protect their interests.

17. Defendants have acted and have failed to act on grounds generally applicable to the class, thereby making preliminary and final injunctive relief appropriate to the class as a whole; to wit, Defendants have wrongfully withheld the right to an equal educational opportunity.

Defendants

18. The BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA exists pursuant to the laws of the United States governing the District of Columbia and is vested with the legal responsibility for the general control of the public schools. As such, the Board has the authority to determine all questions of general policy relating to the schools and to direct expenditures. Defendant ANITA ALLEN is President of said Board of Education. Defendants REV. JAMES E. COATES, MURIEL M. ALEXANDER, CHARLES I. CASSELL, EDWARD L. HANCOCK, NELSON C. ROOTS, ALBERT A. ROSENFIELD, MARTHA S. SWAIM, MATTIE G. TAYLOR, BARDYL R. TIRANA, and EVIE M. WASHINGTON are all duly elected members of the Board of Education of the District of Columbia.

19. HUGH J. SCOTT is the Superintendent of the District of Columbia Public Schools. As such, he is charged with administrative responsibility for the operation of the District of Columbia school system and for the direction of all matters pertaining to the instruction in the public schools, pursuant to D.C. Code §31-105.

20. JOHN L. JOHNSON is the Associate Superintendent in charge of Special Education for the District of Columbia Public Schools. As such, he is responsible for the design, initiation and implementation of all special programs, services and classes in the District of Columbia Public Schools for physically, mentally or emotionally handicapped District children.

21. STANLEY E. JACKSON is Executive Assistant to the Associate Superintendent in charge of Special Education for the District of Columbia Public Schools. As such, he is responsible for the administration of special education programs in the District of Columbia Public Schools.

22. MAMIE H. LINDO is the Supervising Director of the Division of Special Education for the District of Columbia Public Schools. As such, she is responsible for the administration of the tuition grant program and for the selection and placement of children in the tuition grant program.

23. DOROTHY JOHNSON is the Assistant Superintendent in charge of the Department of Elementary Education of the District of Columbia Public Schools. As such, she is charged with the administrative responsibility for the operation of the District of Columbia elementary schools and for the direction and control of pupil admissions to and dismissals from the elementary schools.

24. VINCENT REED is the Assistant Superintendent in charge of the Department of Secondary Education of the District of Columbia Public Schools. As such, he is charged with the administrative responsibility for the operation of the junior and senior high schools and for the direction and control of pupil admissions to and dismissals from the junior and senior high schools.

25. WILBUR A.MILLARD is the Assistant Superintendent in charge of the Department of Pupil Personnel Services of the

District of Columbia Public Schools. As such, he is charged with the administration of testing programs, pupil appraisals, and school attendance investigation.

26. WALTER E. WASHINGTON is the Commissioner of the District of Columbia. As such, he has overall executive responsibility for the operation of the District of Columbia Government, including particularly those functions with respect to requests for appropriations delegated to him by Reorganization Plan No. 3 of 1967, 32 F.R. 11669.

27. PHILIP J. RUTLEDGE is Director of the Department of Human Resources of the District of Columbia. As such, he has responsibility for the care and supervision of all children committed to the care of the Social Services Administration of the District of Columbia Department of Human Resources.

28. WINIFRED THOMPSON is the Director of the Social Services Administration of the District of Columbia Department of Human Resources. As such, she is charged with the responsibility for the care, custody, and guardianship of dependent and neglected children who cannot be properly cared for in their own homes and for the operation of the Social Services Administration in accordance with applicable laws and regulations.

29. EULA DELAINE is the Administrator of Junior Village, an institution wholly maintained and operated by the Social Services Administration and supported by appropriations of Congress for the purpose of the care and treatment of dependent and neglected children. As such, she is charged with the responsibility for the management and direction of Junior Village and for the immediate custody and control of the children residing therein.

30. VESTA RANDALL is the School Liaison Officer for Junior Village. As such, she is charged with the responsibility for the school placement and attendance of Junior Village children in

the Public Schools of the District of Columbia.

31. THE DISTRICT OF COLUMBIA is a municipal corporation and may exercise, pursuant to 1 D.C. Code 102, such powers of a municipal corporation. Through its agencies and instrumentalities, the District of Columbia has the legal responsibility for the custody and supervision of neglected and dependent children, and for providing for the publicly-supported education of school age children of the District of Columbia.

Summary of Factual Allegations Applicable to the Class

32. At all times material to this cause, plaintiffs have been ready, willing, and able to profit from an education but have been deprived of all opportunity for a publicly-supported education for a substantial period of time.

33. Plaintiffs cannot afford a private education. Therefore, Defendants' denial of access to a publicly-supported education deprives plaintiffs of any and all educational opportunity.

34. Upon information and belief, plaintiffs are denied an equal educational opportunity in that other children similarly situated to plaintiffs in all material respects are given a publicly-supported education in a regular public school classroom or otherwise. In particular, Defendants provide tuition grants, special education programs, or specially trained teachers for a substantial number of other children who have been designated as in need of the same kind of special education services as these plaintiffs.

35. The procedures by which plaintiffs are excluded or suspended from public school are arbitrary and do not conform to the due process requirements of the Fifth Amendment. Plaintiffs are excluded and suspended without: (a) notification as to a hearing, the nature of offense or status, any alternative or interim publicly-supported educational services, or the

bases for exclusion or other denial of publicly-supported education; (b) opportunity for representation, a hearing by an impartial arbiter, the presentation of witnesses and evidence, and the confrontation of adverse witnesses; and (c) opportunity for periodic review of the necessity for continued exclusion or suspension.

36. On July 21, 1971, in hearings before the Honorable Judge J. Skelly Wright on a motion to intervene in Hobson v. Hansen, 269 F.Supp. 401 (1967), in behalf of excluded children, the Corporation Counsel conceded in oral argument that the Board of Education has a legal and moral duty to educate these children.

37. On July 28, 1971, attorneys for the plaintiffs forwarded letters to Defendant Scott and Defendant members of the Board of Education requesting them to take immediate action to admit these and all other excluded children for the 1971 Fall term and to seek whatever emergency appropriations necessary for this purpose.

38. On August 5, 1971, attorneys for the plaintiffs conferred with Defendants Scott and John L. Johnson and their attorney for the purpose of securing the actual admission of those excluded children denied a publicly-supported education. At this meeting, Defendants offered their assurances that the then named petitioners would each be placed in a suitable educational program in the Fall term, and that a full list of the remaining children excluded from a publicly-supported education would be compiled. Plaintiffs were subsequently given assurances through Defendants' attorney that eight out of the ten named petitioners would be placed in programs of publicly-supported education, including plaintiffs Liddell, Williams, King and James.

39. On August 10, 1971, the Defendant Superintendent Scott, in a written memorandum to the Defendant Board of Education, stated that the school system was making " a commitment to expand

its limited special education services and to immediately resolve the special problems of these ten students" named in the original suit.

40. In late August, the parents of plaintiffs received letters from Defendant Board of Education informing them that the children had been recommended for a special education tuition grant, but remained on the waiting list for such tuition grants.

41. On September 10, 1971, the school attendance year for the District of Columbia Public Schools began. Plaintiff children have received no notification of any school placement for the 1971 Fall term and remain entirely excluded from all publicly-supported education.

First Claim for Relief: Denial of Access to Publicly-Supported Education

42. By denying plaintiffs access to a publicly-supported education, while providing such an education to other District of Columbia children, Defendants violate plaintiff children's rights guaranteed to them by the United States Constitution, Amendment V, D.C. Code §§31-203 and 31-1101, and District of Columbia Board of Education Rules §§1.1, 14.1, and 14.3, Chapter XIII.

43. District of Columbia Board of Education Rule §18.1, Chapter XIII, which sets forth grounds for exclusion from school, is violative of the right to an equal educational opportunity and, as presently applied, is without statutory authority, insofar as it enables Defendants to exclude plaintiffs entirely from publicly-supported education.

44. The arbitrary application of D.C. Code §31-203, so that children similarly situated to plaintiffs in all material respects are provided special instruction or other publicly-supported education while plaintiffs are denied any publicly-supported education, also denies plaintiffs' right to an equal educational opportunity.

Second Claim for Relief: Fair Procedures

45. In addition, the procedures by which plaintiffs and other children are excluded, suspended, expelled, reassigned or transferred from regular public school classes violate their rights to due process of law, in that there is neither a prior hearing nor a periodic review of their status.

46. Specifically, plaintiffs and other children in the class they represent are denied their constitutional rights to be informed in writing of the reasons for their exclusion, suspension, expulsion, or transfer; to receive a prior hearing, such hearing to be conducted by an impartial arbiter of fact and law or applicable rule, to confront witnesses, to have access to school

records, to present evidence and witnesses in their behalf, to be represented by counsel or other advocate of their choice; and, to a review by an appropriate body, such as the Board of Education.

47. Board Rule §18.1, Chapter XIII, which sets forth grounds for exclusion from school, on its face and as applied, is void for vagueness, and is the subject of such indefinite, arbitrary and capricious abuse, that it violates plaintiffs' constitutional right to due process of law.

48. Plaintiffs are also denied their right to have alternative education made available to them pending and following the outcome of any such proceeding concerning suspension, exclusion, expulsion or transfer from regular classes, or pending any assessment of their need for special education.

Third Claim for Relief: Failure to Provide Wards of the District of Columbia with Regular Instruction

49. By failing to enroll and to provide plaintiffs who are wards of the District of Columbia with programs of publicly-supported education, Defendants further violate these plaintiff children's rights guaranteed to them by the United States Constitution, Amendment V, and D.C. Code §31-201. Defendants of the Social Services Administration of the District of Columbia Department of Human Resources, as guardians to plaintiffs Mills and Blacksheare, dependent wards of the District of Columbia, have failed to discharge their duty to cause such children to be regularly instructed in public or private schools.

50. Specifically, Defendants Thompson, DeLaine, Randall, and Rutledge, and their agents, have failed to enroll plaintiff Mills, a dependent committed ward, and other dependent children resident at Junior Village, in or provide them with programs of publicly-supported education for substantial periods of time.

51. Furthermore, Defendants Thompson and Rutledge have failed to enroll plaintiff Blacksheare, a dependent committed ward, in

or provide him with a program of publicly-supported education for a substantial period of time.

Irreparable Harm

52. Defendants' actions excluding plaintiffs from all publicly-supported education, including the educational services to which they are entitled by the constitutional guarantee of equal educational opportunity, cause plaintiffs to suffer continuing and irreparable harm to their future as students, wage-earners, citizens and members of society.

53. The stigma which attaches to plaintiff children by reason of Defendants' actions constitutes irreparable harm.

54. Defendants' actions create a "self-fulfilling prophecy," Hobson v. Hansen, 269 F.Supp. 401, 491 (D.C. 1967), propelling these plaintiff children toward academic, social and economic failure.

55. Unless Defendants immediately provide publicly-supported education to plaintiffs, these children will suffer a further cumulative deprivation of their declared constitutional and statutory rights to a publicly-supported education.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Declare that Defendants' Rules, policies and practices which exclude children from a regular public school assignment without providing (a) adequate and immediate alternative educational services including, but not limited to, special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternative, deny plaintiff children due process of law and equal protection under the law in accordance with the Fifth Amendment of the United States Constitution.

2. Enjoin Defendants from continuing their policies and practices which exclude children from a regular public school assignment without providing (a) adequate and immediate alternative educational services, including, but not limited to, special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternative.

3. Enjoin Defendants from failing to:

a. Provide plaintiffs, and all members of the class they represent, with a publicly-supported education within thirty days of the entry of its Order;

b. Submit, within fourteen days of the entry of its Order, a report to this Court and counsel for plaintiffs, which shall list each child presently suspended, expelled, or otherwise excluded from a publicly-supported education, the reason for, and the date and length of, each such suspension, expulsion, or exclusion and the proposed time and type of educational placement of each such child;

c. Notify, within forty-eight hours of the submission of said report, the parents or guardian of each such child, and inform each as to the child's right to a publicly-supported education and as to that child's proposed educational placement;

d. Cause to be publicly announced, within twenty days of the entry of its Order, to all parents in the District of Columbia that all children, regardless of handicap or other disability, have a right to an education; and to inform such parents of the procedures required to enroll their children in an appropriate program; and to submit a plan to the Court and counsel for plaintiffs for future periodic announcements.

e. Hold constitutionally adequate hearings before a master or other appropriate person, to be appointed by the Court, for any member of plaintiff class who feels aggrieved by his subsequent educational placement. Such master or other person shall:

(1) Set forth the bases for the proposed assignment or reassignment and provision of interim or special educational services;

(2) Provide an opportunity to each child (a) to receive a medical and psychological examination; and (b) to be represented by an advocate of his own choice and to present evidence presented by school officials or their witnesses;

(3) Determine any appropriate assignment or reassignment; and

(4) Review periodically, at intervals to be set by this Court, any action resulting from his determination, by this same procedure.

f. Provide plaintiffs compensatory services to overcome the effects of any past wrongful exclusion.

g. Expunge or correct the school records of plaintiffs with respect to the reasons for any past wrongful suspensions or exclusions and to reflect the lack of procedures surrounding such suspensions or exclusions.

h. Submit to the Court, within thirty days from the time of the entry of its Order, a plan for adequate hearing procedures to precede any (1) refusal to admit a child to a regular public school assignment; or (2) any reassignment or transfer of a child from a regular public school assignment; and (3) for adequate review of such decisions, including the alternative education provided.

i. Submit to the Court, within thirty days from the entry of its Order, a plan for adequate hearing procedures to precede any suspension of a pupil from school, such plan to include provisions for (1) defining the specific authority granted to school personnel to suspend and the limitations imposed on that authority, (2) the requirement of alternative education for any period of suspension in excess of two consecutive full schoo days, (3) the specific grounds upon which a child may be suspended, (4) written and specific notice to parents or guardian the basis for any proposed suspension, (5) the opportunity for a hearing on any suspension, with representation by counsel, confrontation of witnesses, rebuttal of evidence, presentation of evidence in behalf of the child, and access to the school record of the child, and (6) written notice to parents or guardian of t right of the child to a review of any suspension before an impartial tribunal, such as a committee of the Board of Education.

4. Grant such other and further relief as shall be deemed necessary and appropriate, including but not limited to attorney fees.

Respectfully submitted,

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APPENDIX B

1b

AFFIDAVIT

United States of America)
District of Columbia) ss:

I, EASTER , being first duly sworn, depose and say:

1. I reside at 130 V Street, N.W., Washington, D.C. My thirteen year old son, Duane , resides at Saint Elizabeth's Hospital; he is a dependent ward of the District of Columbi

2. My son Duane was excluded from public school in the District of Columbia in October of 1967. At that time, he was attending the third grade at Giddings Elementary School. In March, 1971, Duane was placed in the seventh grade at Roper Junior High School.

3. Duane had completed the junior primary, first, and second grades at Van Ness Elementary School prior to his exclusion. He entered the third grade in September of 1967. In October of that year, he was transferred to a small "social adjustment" class at Giddings Elementary School, a D.C. public school. I was not contacted prior to this transfer, nor was I given any reason for it. Duane was simply taken to this new school by a student member of the safety patrol in the middle of a regular school day.

4. Duane remained in the class at Giddings for about five days. One day, he came home and told me that he did not have to go to school anymore.

5. It is my understanding that the social adjustment class's special teacher was not in school the week Duane was at Giddings, and a regular substitute took her place. It was this substitute teacher, a Mrs. Jackson, who told Duane to get out and not to come back anymore. I called the school and was told by one of the office personnel that Duane had been dismissed from school.

6. At the time of Duane's dismissal from Giddings, I received no notice of any plan to suspend him, nor was I called to the school

for a conference on the suspension or educational alternatives for my son. I received no written notice of his suspension nor of the reasons for it; no formal hearing was held; and I was not advised of the right to have such a hearing and present spokesmen in Duane's behalf. I was given no indication as to when or how Duane might return to school. Duane's father died on October 17, 1967, but this fact, and its obvious effect on Duane's behavior, was not taken into account by those who were responsible for the decision regarding Duane's exclusion.

7. From October of 1967 through January of 1968, Duane remained at home, without instruction of any kind. No visiting instructor or tutor was assigned to him for that period.

8. In January, 1968, on the suggestion of the Area C Community Mental Health Clinic which Duane had been attended, Duane entered D.C. General Hospital in order to attend a school program there, taught by teachers from the Sharpe Health School. Duane remained in this Area C program until March 10, 1968. At that time, I moved from 1015 12th Street, S.E., in Area C, to my present address in Northwest Washington, which is in Area B. Duane became ineligible for the Area C school program, and there was no comparable program for Area B residents. Doctors who saw Duane while he was at Area C, including a Dr. Weis, diagnosed him as being emotionally disturbed.

9. Upon Duane's leaving Area C in March of 1968, I contacted the Special Education Department of the School Board to find out about an educational alternative for Duane. The School Board sent a visiting home instructor once or twice a week, each time for about forty-five minutes, beginning approximately at the end of April of that year. The instructor continued to come to our home for individual lessons from September through June of the 1968-1969 school year. Over the course of that year, the number of instruction sessions decreased to about one a week. Often the

visiting instructor merely came to the house and talked to me, without offering Duane any academic lessons.

10. In September of 1969, Duane was referred to Saint Elizabeth's Hospital by a psychiatrist at Children's Hospital, where I had taken Duane to the clinic. He was discharged from St. Elizabeth's after only four days, as his doctor, a Dr. Shingle, felt that Duane did not need the kind of treatment offered at the hospital.

11. In November of 1969, Duane entered the DIAL program, a special class at the Perry School, a D.C. public school. Duane was expelled from this class approximately one week later for fighting and causing a disturbance. I received a letter from the Special Education office, stating that Duane was not ready for the DIAL program. I therefore contacted the Sharpe Health School and then Dr. Stanley Jackson to request another visiting home instructor to compensate for this lack of formal education, but Dr. Jackson denied my request.

12. Duane had previously been placed on the waiting list for Overbrook School, a private residential facility in Virginia. However, I learned that the School Board would not pay for all of the tuition for Overbrook, but could only pay approximately one-third.

13. During the summer of 1970, William Raspberry of The Washington Post, after writing a feature article about Duane and the plight of other children needing special education in the District, contacted Mrs. Lindo at the Department of Special Education. She had been in charge of Duane's file for some time. However, even though Mr. Whitt at the Overbrook School had told me Duane could be accepted if the tuition were paid, Mrs. Lindo did not succeed in arranging a tuition grant for Duane.

14. In May, 1970, I filed a Beyond Control complaint on Duane in the D.C. Juvenile Court, so that he would be enrolled in a suitable school program. On November 16, 1970, Duane was made a ward of the Social Services Administration, with the Court ordering that

Duane be provided an education at Overbrook. Unknown to the Court, the residential section of Overbrook was closed at about that time. Nonetheless, Duane was committed to SSA as a dependent child and was sent to Junior Village to await transfer to Overbrook. At Junior Village, Duane ran away and came home twice within four days of his arrival there, because of sexual assaults by other boys at Junior Village. On November 20, 1970, Duane was sent to Cedar Knoll because of his abscondances from Junior Village. We had returned to Court and Judge Goodrich had ordered him transferred to Maple Glen, but when I went to visit, I found that he was at Cedar Knoll instead. Duane remained at Cedar Knoll for about one week. He was then transferred to Oak Hill, for fear he might run away, even though, to my knowledge, he had made no attempts to run away from Cedar Knoll. The windows at Oak Hill have prison-like bars, and the campus is surrounded by barbed-wire fences. Duane was kept in isolation for sixteen hours a day at Oak Hill. After Christmas, he was returned to Cedar Knoll, where he finally was placed in a school program at that institution.

15. In February of 1971, I returned to Juvenile Court and requested that Duane be allowed to return home. This request was granted, and Duane has been at home since late February.

16. A few days after Duane's return home, I visited the Special Education office of the D.C. School Board to try to make some appropriate arrangements for Duane's continuing education. An article detailing Duane's lack of schooling had appeared in the Washington Star a few days earlier. Without conducting an evaluation or diagnostic interview of any kind, Mr. Queen, of the Special Education Department, placed Duane in a seventh grade class at Roper Junior High. These arrangements were made the same day as my visit to Mr. Queen's office. Roper is approximately one hour's distance by bus from our home.

17. Duane completed the school year at Roper Junior High School. He received no marks and was not enrolled in any specific grade for the following year.

18. On July 13, 1971, Duane entered D.C. General Hospital on a voluntary basis for medical care and counseling. He indicated to me that he wanted to go to St. Elizabeth's Hospital so that he could return to school as soon as possible.

19. On September 10, 1971, Duane was transferred to St. Elizabeth's Hospital. Here he is just sitting around doing nothing. He has no schooling of any kind. During the summer, Duane returned home for weekend visits, and his behavior was excellent. He has told me many times that all he wants to do is go back to school. Duane says, "My nine year old sister knows more than I do."

20. Duane needs a classroom where he can learn. He needs it now.

EASTER

Subscribed and sworn to before me this 21st day of September, 1971, in the District of Columbia.

Notary Public

My Commission Expires July 14, [illegible]

APPENDIX H

1.b.

AFFIDAVIT

United States of America)
District of Columbia) SS:

I, NONA M. FLYNN, being first duly sworn, depose and say:

1. I reside at 7223 Van Ness Court, McLean, Virginia.

2. I am presently employed as Coordinator of the Child Study Center, Department of Special Education, The George Washington University, and am a doctoral candidate in the field of special education.

3. I have received my M.A. degree from The George Washington University. My work experience in the field of special education has included the following positions: coordinator of educational research studies with physically handicapped children at Cybernetics Research Institute, Washington, D.C.; teacher of special classes of children of migrant workers in LaGrange, Texas; director of a tutoring program for Christ Child Settlement House, Washington, D.C.; and diagnostic-prescriptive teacher, Prince William's County.

4. On March 19, 1971, I conducted an educational evaluation of Duane Blacksheare, at the Child Study Center, The George Washington University.

5. It is my professional opinion that Duane Blacksheare can profit from an education.

6. Duane visited the Child Study Center with his mother for a one-hour evaluation period. He was eager to discuss his present placement at Roper Junior High and displayed no signs of uneasiness or shyness during the interview. In the two week period preceding the interview Duane's lunch money was taken from him several times and he was threatened by several groups of boys. He stated that he could "take care of them" but would not fight at school anymore because he was not going to be "kicked out again for fighting."

7. Duane expresses a strong desire to remain in school but is also very much threatened by the present situation at Roper.

He has been instructed by the assistant principal not to talk about his background to his teachers or peers, and no supportive services have been arranged. Roper Junior High is approximately a one-hour bus ride from his home.

8. Duane's reading ability is difficult to assess accurately. Functionally, he is reading on a first grade level. However, he appeared to recall words more readily toward the end of the passage assigned. He apparently has done little or no reading geared to his general level in a long time. With intensive review I would expect his reading level to jump at least to a second grade level in a short period of time.

9. His mastery of the basic math skills is very limited. He remembered the mechanics of addition and subtraction but reverted to counting with his fingers to work problems.

10. Duane is functioning on an elementary level academically. Prior to placement, a special program should be carefully worked out with his teachers and ancillary services at a school within a reasonable transportation distance from Duane's home. The school counselor would see him on a weekly basis and stay in close touch with his teachers.

11. At this time Duane is severely academically retarded due to a variety of circumstances resulting in lack of consistent and prolonged instruction for approximately three and one half years. He seems eager and receptive to continuing his education at this time, and appropriate arrangements should be made as quickly as possible to prevent further academic retardation and emotional handicaps.

Nona M. Flynn

NONA M. FLYNN

Subscribed and sworn to before me this day of , 1971.

My commission expires

Appendix U
1.b.

PETER MILLS, et al.)
)
v.) Civil Action No. 1939-71
)
BOARD OF EDUCATION, et al.)

AFFIDAVIT

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

I, IGNACY GOLDBERG, being first duly sworn, depose and say:

1. I reside at 501 West 120th Street, New York, New York 10027.

2. I am presently Professor of Education in the Department of Special Education, Teachers College, Columbia University, New York City.

3. I am the holder of a Master's Degree and Doctorate from the Teachers College of Columbia University in the field of Special Education, and a Magister Philosophiae degree from the University of Warsaw. I also hold a Professional Diploma from the Teachers College of Columbia University as a supervisor of work with the physically and mentally handicapped. At present, I am Secretary General of the International Association for the Scientific Study of Mental Deficiency, a fellow and past-president of the American Association on Mental Deficiency, and a fellow of the American Association for the Advancement of Science.

I have previously held the position of Director of the Department of Rehabilitation of the Indiana State School in Butlerville, Indiana, an institution for two thousand retarded persons. I have been on the faculty of Teachers College of Columbia University since 1957.

I have also served as a visiting professor, instructor, and lecturer at various colleges and universities, including the

Universities of Alaska, Kansas, and Indiana, and the State Colleges of Connecticut and Wisconsin. I have been a consultant to several governmental and private agencies, including the President's Panel on Mental Retardation; the 1965 White House Conference on Education; the 1966 White House Conference on Health; the Children's Bureau of the Department of Health, Education and Welfare; the National Association for Retarded Children; the New York City Board of Education; the Kennedy Child Study Center, and various private schools and institutes for exceptional children. My professional associations include membership in the National Education Association, the American Academy on Mental Retardation, the American Education Research Association, the American Psychological Association and the Council for Exceptional Children. I am the author of numerous professional treatises and publications pertaining to the education of exceptional children. (Bibliography attached) In the past twenty years, I have helped to train several hundred teachers and professional leaders in the field of special education. As a result of my work and research in special education, I have been listed in Who's Who in America, Who's Who in American Education, and American Men of Science.

4. A fundamental belief of American democracy is that the good society results when each individual is given the opportunity to develop with the aid of a publicly-supported school system. Therefore, the public school system holds as its main objective the provision of education for all children. The obligation of the public schools is to accept each child who falls within a certain age range, to provide an environment that is friendly to each, and to offer experiences which will be useful to each. I strongly hold the belief that our school system is, and was established to be, available to all, part of the birthright of every American child.

5. In our society the goal of education is to guarantee each individual throughout his life a full and equal opportun to secure the skills, the knowledge and the understanding nec sary to fulfill himself as an individual and as a constructiv member of society. Education, in my opinion, is a continuou process of developing life skills needed for effective coping with developmental and environmental tasks and demands. Scho is that part of the educational process which deals with the highly organized and structured development of life skills. child and particularly every exceptional child can be assiste in dealing with the problems of his environment by some form of schooling. The form of education to be provided will nec sarily vary with the ability and the circumstances of that ch

6. In recent years the national policy of providing an education for all children has been given renewed emphasis. In 1963 in a presidential message to the 88th Congress Preside Kennedy charged all levels of government to end the neglect o the mentally ill and the mentally retarded and to provide improved services and opportunities for such exceptional citize Four consecutive United States Presidents have expressed enou personal interest to carry forward presidential panels and com missions aimed at involving both government, at all levels, a private organizations to establish far-reaching programs to combat and ameliorate mental retardation.

7. Denial of educational opportunities for exceptional children not only frustrates this policy, but is a source of harm to the family and to the community of that excluded chil According to the principle of "normalization" widely adhered t in much of Western Europe the mentally retarded or other exceptional person should lead a life as close to the normal as possible. Denying an education to an exceptional child is yet another burden on a family which is already handicapped.

The main handicaps to the family of the excluded child are financial, social and emotional. In the course of my professional work, I have been privileged to visit thousands of parents of exceptional children. I have learned the immeasurable tragedy of having a child who differs so much from his brothers, sisters, and his neighbors' children that the child is rejected and denied educational services. Such a denial of help can only produce further disruption of the family's unity and the parents' physical and mental health, not to mention their finances.

8. Because of the extremely negative and stigmatized label which refer to those individuals who manifest marked difficulti in coping with their developmental tasks and because of the substantial risks of misclassification or faulty placements, procedural safeguards are essential. Sufficient cause for the abridgement of any right, such as the right to attend regular classes, must be specifically determined. The exceptional child has a right to fair procedures which will provide for a thorough assessment of his abilities and disabilities and will secure his placement in a learning environment appropriate to his educational diagnoses. A corollary of the principle of due process in the field of education is the requirement of periodic review and provision for the return to regular instruction when there is no longer sufficient reason for restriction. Even in the best residential facilities there is an uncomfortable similarity between them and prisons, albeit very permissive prisons. The decision to remove a child from regular classes, or from public school classes altogether, often will propel that child towards a residential facility which must accept him when he is rejected by the public schools For these reasons adequate due process principles, and the principle of positive presumption, i.e., that the child's right

are presumed in the absence of sufficient cause for their denial, must obtain in any determinations affecting a child's eligibility for regular education.

9. The need to reexamine the procedures by which children are excluded or transferred to special classes develops out of two historical trends. The first is that traditionally public school classes for the exceptional child accommodated many "slow learners" recruited principally from among the immigrant populatio In addition, such classes often became dumping grounds for those children and youths who bothered the regular class teacher. Moreover, the label rather than the disability can come to define the individual's function in society. Thus, an individual who is considered mentally retarded by school authorities may not be so regarded by his friends and his family. The label may then affect the child's school career, thus giving rise to the apt phrase, "the six-hour retarded child -- retarded from 9 to 3, five days a week." One may ask whether many children are classified as exceptional, when the true nature of their learning disabilities stems from environmental factors. Furthermore, the problems resulting from such faulty classifications impinge primarily upon the so-called culturally disadvantaged. Thus, the President's Committee on Mental Retardation in 1968 reported that a child in a low income rural or urban family is 15 times more likely to be diagnosed as retarded than is a child from a higher income family. Two additional reasons argue for full due process safeguards. First, parents of exceptional children must be involved in the process of decision making about educational goals and objectives. They must accept and to some extent understand these goals if they are to exert appropriate supporting efforts. Second, the parent of an exceptional child may feel that he has very little choice in finding any alternative educational

placement other than that proposed by the school authorities. Parents in desperation will simply agree with anything that the school authorities propose, whether suitable or not, in order to help their child.

10. Nationally, more than 90% of the mentally retarded children enrolled in public education are in local public schools. For many exceptional children, as the large gap between the number in need and those being served reveals, despite great progress in providing opportunities and diverse educational strategies to the exceptional children, the goals of education continue to have little meaning for those excluded from publicly-supported education. Special education for the exceptional child has now become commonplace and is widely recognized as a socially required service to those who cannot adapt to the conventional school system. The function of the public schools for these children should be educational rather than custodial and its programs must be reasonably related to the individual needs and capacities. Otherwise, the exceptional person is denied his inalienable human rights. As Goethe once said: "If you treat an individual as he is, he will stay as he is; but if you treat him as if he were what he ought to be, he will become what he ought to be and could be."

Ignacy Goldberg
IGNACY GOLDBERG

Subscribed and sworn to before me,
this 13 day of December, 1971.

Grace Mason
Notary Public

My Commission Expires:

PUBLICATIONS

I. Ignacy Goldberg
6/70

Co-Editor, Polish Digest. Published monthly by the Polish Information Center, Johannesburg, South Africa. 1944 - 1946.

"Poland and Jews." Jewish Affairs. Issued monthly by the South African Jewish Board of Deputies, 4:9 (February, 1945), p. 1.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER MILLS, et al., Plaintiffs,	)	
v.	)	Civil Action No. 1939-71
BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA, et al., Defendants.	)	

MEMORANDUM IN SUPPORT OF VERIFIED COMPLAINT

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TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE VALUE OF EDUCATION IN A FREE SOCIETY 2

II. THE DENIAL OF EDUCATION TO HANDICAPPED CHILDREN IN THE DISTRICT OF COLUMBIA 4

III. THE CONSTITUTIONAL REQUIREMENT OF EQUAL EDUCATIONAL OPPORTUNITY 8

IV. PLAINTIFFS' EFFORTS TO OBTAIN PUBLIC EDUCATION 9

V. THE ISSUES IN THE SUIT 10

VI. ARGUMENT 11

- A. DEFENDANTS, BY TOTALLY DENYING PLAINTIFF CHILDREN AN OPPORTUNITY TO RECEIVE A PUBLICLY-SUPPORTED EDUCATION, VIOLATE THE CONSTITUTIONAL MANDATE TO PROVIDE THEM WITH AN EQUAL EDUCATIONAL OPPORTUNITY 11
- B. DEFENDANTS EXCLUDE PLAINTIFF CHILDREN IN VIOLATION OF THE STATUTES OF THE DISTRICT OF COLUMBIA 25
- C. DEFENDANTS' FAILURE TO PROVIDE FOR THE EDUCATION OF CHILDREN WHO ARE THEIR WARDS, COMMITTED TO THE DEPARTMENT OF HUMAN RESOURCES, SOCIAL SERVICES ADMINISTRATION, VIOLATES CONSTITUTIONAL AND STATUTORY MANDATES 28
- D. THE EXCLUSIONARY RULE OF THE DEFENDANT BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA EXCEEDS ITS UNDERLYING STATUTORY AUTHORITY AND VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES 32
- E. DEFENDANTS, BY FAILING TO PROVIDE ANY ADEQUATE FAIR HEARING PRIOR TO EXCLUSION OR REASSIGNMENT, OR PERIODIC REVIEW THEREAFTER, DENY PLAINTIFFS DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES 35
- F. DECLARATORY AND INJUNCTIVE REMEDIES ARE NECESSARY TO IMMEDIATELY AND PROSPECTIVELY PROTECT PLAINTIFFS FROM DENIAL OF THEIR DECLARED, CONSTITUTIONAL, AND STATUTORY RIGHTS . 41

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MEMORANDUM IN SUPPORT OF VERIFIED COMPLAINT

INTRODUCTION

Plaintiffs are school age children whom Defendants have excluded, and are excluding, entirely from the District of Columbia Public Schools. Defendants completely deny to these children a publicly-supported education. Plaintiffs are primarily poor and black and are without financial means to obtain private instruction. Each plaintiff desires a publicly-supported education and would profit from such an education were it made available. Furthermore, plaintiff children have been denied an education without fair hearings concerning such exclusion or alternative educational placement and without periodic review of their status.

Plaintiff children have been excluded from the very public education which the District of Columbia deems so important as to make it compulsory for ten years of every child's life. D.C. Code §31-201. Moreover, Defendants deny to plaintiffs the right to admission in the Public Schools of the District of Columbia which it freely provides for other school age children under

Rule §1.1, Chapter XIII, of the District of Columbia Board of Education Rules. The District and its agents have deprived plaintiffs of their opportunity to become functioning members of our society. Such unequal treatment of plaintiff children by the District of Columbia is unjustifiable and arbitrary, and in violation of the Constitution of the United States and the statutes and rules in force in the District of Columbia.

Furthermore, Defendants' above-stated actions, which withhold or deny alternative forms of public education without a fair hearing, are in violation of plaintiffs' rights pursuant to Sections 31-203 and 31-1101 of the District of Columbia Code, Rules §1.1, 14.1 and 14.3, Chapter XIII,of the District of Columbia Board of Education Rules, and the Fifth Amendment Due Process Clause of the United States Constitution.

Plaintiffs make this claim on behalf of all school age children who are eligible for a free public education, but whom Defendants have excluded from public school attendance and otherwise deprived of access to any publicly-supported education. The class is also predominantly black and poor and without financial means to obtain private, alternative schooling.

I. THE VALUE OF EDUCATION IN A FREE SOCIETY

The United States Supreme Court, in Brown v. Board of Education, 347 U.S. 483, 493 (1954), emphasized the uniquely important role of education in our society:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that *any* child may reasonably be

> expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (Emphasis supplied)

Judicial recognition of the high purpose and the crucial importance of publicly-provided schooling is pervasive.[1] Thus, in Dixon v. Alabama State Board of Education, 294 F.2d 150, 157 (5th Cir. 1961), the Court reiterated:

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

These goals pertain with equal and, perhaps, even greater force to retarded, handicapped, or otherwise disadvantaged children. Without the opportunity to obtain a structured, formal education, these children, unlike others, may never learn.[2] For such children, development and learning are unlikely to come informally or environmentally, as they do for ordinary children. The consequences of non-education are thus far more severe for mentally, emotionally or physically impaired citizens. Absent education, the retarded or handicapped citizen will be unable to function in society and may never develop the skills even to care for himself. He is thus placed in jeopardy of institutionalization, loss of liberty, and even loss of life.

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[1] Other courts have similarly recognized the value of education and have stood fast against its denial to particular groups. See, for example, Madera v. Board of Education, 267 F.Supp. 356, 370 (S.D. N.Y. 1967):

> To a minor child in New York, the right to a public school education is of monumental value; it will produce great benefits for him in both tangible and intangible terms in later life. In addition, the education of each child is of paramount importance to us as a nation. A democracy can have no more precious resource than its citizenry.

[2] See, e.g., Affidavit of Dr. Erwin Friedman, attached to the Verified Complaint as Appendix N, concerning the successful results of teaching profoundly retarded individuals to become self-sufficient and self-caring members of society.

II. THE DENIAL OF EDUCATION TO HANDICAPPED CHILDREN IN THE DISTRICT OF COLUMBIA

Despite the acknowledged importance of education, countless numbers of American children are being excluded from publicly-provided schooling.[3] In the District of Columbia, nearly 4,000 children, identified as exceptional by the Board o Education, are enrolled in various forms of publicly-supported education.[4] Yet, there remain an unspecified number of children who are not enrolled in any school program. In the District of Columbia, there are an estimated 22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children, and perhaps as many as 18,000 of these children are not being furnished with programs of specialized public education.[5]

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[3] Exclusion from school, as recent documents indicate, is a problem of national dimensions. The Department of Health, Education and Welfare's Office of Education, Bureau of the Handicapped, has conducted conferences on the problem of school exclusion with the participation of social scientists and educator Citing practices of exclusion and school-encouraged non-attendance in the public schools, these experts concluded:

> Through legal, quasi-legal and extra-legal devices or through apathy, schools cause, encourage, and welcome the lack of attendance in school of millions of American youngsters. Such activity by the educational system serves as a denial of civil rights as massive as the separate school systems maintained by law in prior years. . . .
> Some examples of extra-legal exclusions are:
> 1. The continuous suspension.
> 2. The refusal to enroll a child in school.
> 3. The conditional, unofficial suspension.
> 4. The waiting list.
> 5. The use of home-bound instruction.

Regal, Elliott, Grossman and Morse, "The Systematic Exclusion of Children From School" (1971) at 15, 17. See, also, Conference on the Systematic Exclusion of Children from Public Schools, Jun 25-27, 1970, Washington, D.C. "Conference Report I" (1970) at 2-

[4] The District of Columbia, according to data prepared by the Board of Education, Division of Planning, Research, and Evaluation, provides publicly-supported Special Education programs of various descriptions to at least 3880 school age children. In 1970-71, 3093 of these children were served in regularly funded special education programs in the District of Columbia Public Schools. See Exhibit A: Regularly Funded Special Education Programs in the D.C. Public Schools, 1970-71. One hundred and twenty-nine additional children were enrolled in federally funde special education programs under Title III of the Elementary and Secondary Education Act. See, Exhibit B: ESEA Title III Federal Programs of Special Education in the D.C. Public Schools, 1970-7 In addition, the Department of Special Education lists 665 District of Columbia children as being provided with a publicly-supported education by non-public school resources. See Exhibit C: Membership: Special Education Programs and Services, 1970-71 Non-Public School Resources. Defendant Board of Education operates a continuum of services which include supportive part-time services to children in regular classes; special classes for severely mentally retarded, blind, hearing impaired, crippled, emotionally disturbed, learning disabled and severely maladjuste children; special schools for physically handicapped and severe retarded children; visiting home instruction and mental health center teachers for the hospitalized; and tuition grants for retarded, severely emotionally disturbed, and other handicapped children.

The seven named plaintiffs are representative of the many children who have been denied access to public schooling. The District's continuing failure to fulfill its statutory duty to count and identify all school age children[6] render it, and plaintiffs, incapable of informing this Court as to the precise number of such children. However, in a 1971 report to HEW, the District of Columbia Public Schools admit that 12,340 handicapped children are not to be served in the 1971-72 school year.[7]

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[5] Admittedly, some limited numbers of exceptional children are enrolled in private school programs and others are forced to endure inappropriate placements in regular programs. (See, e.g., the Affidavit of Bobbie McMahan, attached as Appendix M to the Verified Complaint) Yet, under the Rules of the Board of Education each such child has a right to a free public education which provides instruction adapted to his or her needs. However, as the school system recognizes, many of these children are denied the right to public education because of their handicaps. See, e.g., Exhibit D: Memorandum of Julius W. Hobson, Member of the Board of Education, to the District of Columbia Board of Education, "The Tuition Grant Program of the District of Columbia Public Schools," Nov. 19, 1969. The Board of Education has frequently acknowledged the existence of a large number of children denied a public education. Thus, for example, in the Superintendent's charge to the Citizen's Task Force on Special Education, it is stated that:

> There is a large number of youth who have been excluded from public education due to inadequacies. Too many children are denied the right to public education because of handicaps.

Board of Education, "Rationale for Task Force on Special Education," (1971) at 1.

[6] Unfortunately, although required by Section 31-208 of the D.C. Code (1967 Ed.), a census of all children aged 3-18 in the District is not taken. Nor have repeated requests by plaintiffs' counsel to Defendants brought forth this information.

[7] District of Columbia Public Schools, "Description of Projected Activities for Fiscal Year 1972 for the Education of Handicapped Children," March 15, 1971. See especially Part II: Description of State Special Education Program. (Attached as Exhibit E.)

For retarded children alone, the District reports a waiting list of 570.[8]

Defendant Board of Education maintains a Department of Special Education whose purpose is to provide for the education of these exceptional children. The function of this Department, according to its 1970-71 statement, Public Schools of the District of Columbia, "Special Education Information Bulletin," at 1, is to provide

> instruction and services for children who differ from the average to such a degree in intellectual, physical, or emotional characteristics as to require resources and assistance beyond that normally available within regular classes.

To this end, the Department operates special classes and schools, provides part-time instruction to homebound children and to handicapped children enrolled in regular classes, and provides tuition grants for instruction in private schools to children whose needs cannot be met in the public schools. Indeed, the policy statements of the Department and the range of services which it does offer to some children confirm its previously admitted legal and moral duty not to withhold schooling from plaintiff exceptional children.

The named plaintiffs in this suit have been completely excluded from education for periods ranging from four months to as long as six years.[9] During such periods, these children and others similarly situated have irretrievably suffered learning losses and have been exposed to the emotional distress which naturally accompanies a child's exclusion from the expected activity of school attendance. Accordingly, the valuable right to a publicly-supported education, a right supposedly made available to all children of the District, must no longer be denied to the exceptional child. To continue official disregard of the exceptional child is not only to frustrate the aim and integrity of the District's educational responsibilities, and to exact a heavy toll in liberty and the quality of life for disabled children, but is also to impose upon the District the great and unnecessary cost of continued institutionalization of uneducated retarded and mentally disturbed children.[10] Such children, if they are not to become future and permanent charges of the District, require structured education now, in their best learning years. The seven plaintiff children, and the unnumbered children they represent, merely request the opportunity to learn to the best of their potential and to become self-sustaining members of society.[11]

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[8] Ibid., at 4. Of these 570 children, this State Plan lists 467 as awaiting placement in special classes operated by the District of Columbia Public Schools and 103 as awaiting tuition for private school. This plan also refers to waiting lists of 189 learning disabled children and one blind child.

[9] See, e.g., the Affidavit of Andrew describing the exclusion of his daughter, Janice, for the preceeding six years; the Affidavit of Easter, describing the exclusion of her son, Duane, for periods totalling nearly four years; the Affidavit of Daisy, describing the exclusion of her son, George, for over one year; the Affidavit of Ina, describing the exclusion of her son, Steven, for two years; the Affidavit of Marva, describing the exclusion of her son, Michael, for a period of over two years; the Affidavit of Mary, describing the exclusion of her son, Jerome, for five years; and the Affidavit of Scott, describing the exclusion of Peter for four months. These affidavits are attached to the Verified Complaint.

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[10] Non-education of the handicapped does more than destroy the life prospects of the individual: it costs society. Institutional care costs approximately $40,000 per bed in construction costs, and yearly maintenance of the retarded ranges from $2,000 to $10,000. *These, Too, Must Be Equal:America's Needs in Habilitation and Employment of the Mentally Retarded*, President's Committee on Mental Retardation (1969) at 14. In the District of Columbia, the cost of such institutionalization, estimated at $6,000 per child per annum, is more than double the per pupil cost of an adequate community school program for such children. "Forest Haven: 200 Wait Mindlessly for Death," *The Washington Post*, May 26, 1971, at A1. A8. See Affidavits of Joan C. Gendreau, William P. Argy, and Erwin Friedman, attached to the Verified Complaint as Appendices N, O, and P.

[11] A three-judge Federal Court has recently ordered the Commonwealth of Pennsylvania to provide a free public education to all retarded children in the state. The Court ruled that all are capable of benefiting from an education and have a right to one. The order, issued as a consent decree, requires the public school authorities, as well as the Secretary of the Department of Public Welfare, to provide to all retarded children "access to a free public program of education and training."
"Court Bids Pennsylvania Provide School to all Retarded Children" *The New York Times*, October 9, 1971, at 1.

III. THE CONSTITUTIONAL REQUIREMENT OF EQUAL EDUCATIONAL OPPORTUNITY

The Fifth Amendment to the United States Constitution requires Defendant District of Columbia public school authorities to provide all children who reside in the District of Columbia with an equal opportunity to receive a publicly-supported education.[12] *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Indeed, in a prior proceeding involving this identical issue, Defendants admitted their "legal and moral responsibility" to provide an education to plaintiffs and all children of school ag in the District,[13] regardless of any handicapping status. The fundamental obligation to provide an opportunity for education to all school age children has been frequently acknowledged by the D.C. Public Schools elsewhere.[14]

12/ See particularly the United States District Court's declar ation as to these plaintiffs in *Hobson* v. *Hansen*, Ruling on Motion to Intervene, July 23, 1971 (Exhibit F) at 4:

> Certain it is that a serious legal and equitable issue is presented for some court. Certain it is, too, that resolution of this tragic problem has been facilitated by defendants' concession of their legal responsibility to provide for the education of these children.

13/ See Ruling on Motion to Intervene, *id.*, at 3. "They conced as they must that the Board has a legal obligation to educate these children to the extent they are able to accept education." See also Exhibit G, Memorandum from Dr. John Johnson, Division of Special Education, to Superintendent of Schools Hugh Scott, August 11, 1971, at 2, 5.

14/ The Summary Budget Review for the City of Washington, D.C. Fiscal Year 1972, at 32, proclaims that: . . .

> *Education* has as its objective, to provide educational experiences which will afford *all* individuals in the community an opportunity to fully develop their intellectual, social and economic potentials. [Emphasis supplied]

See also, Submission of D.C. Board of Education to U.S. Department of Health, Education and Welfare for Title VI funds (1970), Description of Projected Activities for Fiscal Year 1971 for the Education of Handicapped Children, at 26:

> We are committed to helping *each child, no matter what his handicap or ability*, realize a life of happiness and productivity. The Division of Special Education joins hands with everyone interested in the welfare of exceptional children in aiding each child to become his best self. [Emphasis supplied]

IV. PLAINTIFFS' EFFORTS TO OBTAIN PUBLIC EDUCATION

Defendants further admitted in oral argument on the Motion to Intervene in Hobson v. Hansen, supra, that petitioners in that proceeding had been denied placement in programs of publicly-supported education.[15/] Counsel for plaintiffs formally requested the Board of Education and the Superintendent of Schools to take immediate action to admit these children and all other excluded children to schooling in the fall term and to seek whatever emergency appropriations necessary for this purpose.[16/] At meetings with Defendants Scott, John L. Johnson, and their attorney, plaintiffs' attorneys were assured that the petitioners in the original proceedings would be promptly readmitted to school programs in the 1971-72 School Year. Defendant Scott, in written memorandum to the Board of Education on August 10, 1971, further indicated that the "school system is making a commitment . . . to immediately resolve the special problem of these ten students."[17/]

On September 10, 1971, the school attendance year for the District of Columbia began. As of that date, plaintiffs had received no notification of any specific school placements for the 1971 fall term. They and other plaintiff children remain entirely excluded from all publicly-supported education, whether of an interim or long-term nature.

[15/] See Ruling on Motion to Intervene, supra, at 3: "Defendants concede that petitioners are exceptional children who have been denied placement in a special public school program or a private education facility financed by tuition grant." Plaintiffs Blacksheare, Liddell, Gaston, Williams, James, and King were petitioners in the prior proceeding. Four other children named in this proceeding have since been enrolled by the Board of Education in programs of publicly-supported education.

[16/] See Exhibit H: Letter from Messrs. Tepper, Herr, Kirp, Dimond, Yudof, and Mrs. Wald to Superintendent of Schools Scott and Members of the Board of Education, July 28, 1971.

[17/] Memorandum of Hugh J. Scott to the Board of Education of the District of Columbia, August 10, 1971. (Exhibit J.)

V. THE ISSUES IN THE SUIT

At issue here is the constitutional validity of this pervasive pattern of exclusion from publicly-supported education suffered by these unnumbered plaintiff children. Simply stated, the questions presented are (1) whether Defendants may completely exclude some children from a publicly-supported education and (2) whether Defendants may transfer or exclude a child from regular classroom instruction or from a regular school without notice and without an opportunity to be heard at a hearing in accordance with the requirements of due process.

Specifically, the issues raised in the complaint are:

A. Whether Defendants, by totally denying plaintiff children an opportunity to receive a publicly-supported education, violate the Constitutional mandate to provide them with an equal educational opportunity.

B. Whether Defendants exclude plaintiff children in violation of the statutes of the District of Columbia.

C. Whether Defendants' failure to provide for the education of children who are their wards, committed to the Department of Human Resources, Social Services Administration, violates Constitutional and statutory mandates.

D. Whether the exclusionary rule of the Defendant Board of Education of the District of Columbia, Rule 18.1, Chapter XIII, exceeds its underlying statutory authority and violates the due process requirements of the Constitution of the United States.

E. Whether Defendants, by failing to provide any adequate fair hearing prior to exclusion or reassignment, or periodic review thereafter, deny plaintiffs due process of law under the Constitution of the United States.

F. What remedies are necessary, immediately and prospectively, to protect plaintiffs from continued denial of their declared, Constitutional, and statutory rights.

VI. ARGUMENT

A. DEFENDANTS, BY TOTALLY DENYING PLAINTIFF CHILDREN AN OPPORTUNITY TO RECEIVE A PUBLICLY-SUPPORTED EDUCATION, VIOLATE THE CONSTITUTIONAL MANDATE TO PROVIDE THEM WITH AN EQUAL EDUCATIONAL OPPORTUNITY.

Plaintiff children can not be constitutionally denied the publicly-supported education which Defendants freely provide to other children, normal and exceptional. The District of Columbia has undertaken to, and must, provide public education for all of its children, including all of its exceptional children.

Rule 1.1, Chapter XIII, of the District of Columbia Board of Education Rules expressly declares the District's longstanding obligation to provide public education to all children of school age.[18/] District of Columbia Code Sections 31-1110, 31-1111, 31-1112, and 31-1113, enacted in 1878, while unconstitutionally maintaining separate schools for "colored" and white children, did recognize this absolute right of all children of both races to attend some school, along with the Board of Education's concurrent duty to provide suitable rooms and teachers to fulfill such right.[19/] In spite of their statutory and regulatory mandate, Defendants have excluded plaintiff children from the public schools and have failed to provide alternative publicly-supported education, thereby denying plaintiffs an education while offering it freely to all other school children resident in the District of Columbia. The plaintiffs are a class of children who have

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[18/]

> All children of the ages hereinafter prescribed, who are bona fide residents of the District of Columbia, are entitled to admission and free tuition in the Public Schools of the District of Columbia, subject to the requirements of the rules, regulations, and orders of the Board of Education and the applicable statutes.

Rule 1.1, Chapter XIII, Rules of the Board of Education, District of Columbia.

[19/] See, e.g., Miller v. Board of Education of the District of Columbia, 106 F.Supp. 988, 991-92 (1952):

> It is the duty of the District to provide equal educational facilities within the District for deaf children of both races, if it provides for any therein.

been deprived of all publicly-supported education. The central issue of this case is whether such callous, unequal and discriminatory treatment of children is justified under the Constitution of the United States and the statutes or regulations of the District of Columbia.

The Constitutional requirement of equal protection clearly applies to the District's actions in providing the opportunity of public education to its residents. "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Education, 347 U.S. 483 (1954) (Emphasis supplied); Bolling v. Sharpe, supra. Denial of any education to any school age child constitutes a violation of this right. In its decisions in Hobson v. Hansen,[20/] the Court has declared that the Constitution requires the Defendant District of Columbia public school authorities to provide all children who reside in the District with an equal educational opportunity. Defendants' exclusion of plaintiff children from all publicly-supported education presents an even more fundamental violation of the Constitution than that presented in Hobson -- here plaintiffs are denied not just an equal educational opportunity, but all educational opportunity. Here, Defendants offer public education to some while denying it altogether to plaintiff children and the class they represent. No more palpably and objectively measurable denial of the legal right to education can be imagined.

Disparities in the provision of educational opportunity must be grounded in a compelling interest. Hobson I and II, supra. Where the state's actions affect a fundamental interest,

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[20/] See, particularly, Hobson v. Hansen, 269 F.Supp. 401 (D. D.C. 1967) [Hobson I]; Hobson v. Hansen, Memorandum and Order of May 25, 1971 [Hobson II].

(e.g., voting or travel), or create an inherently suspect classification (e.g., wealth or race), they are more closely scrutinized and may be upheld only if the state can show a "compelling state interest [sufficient] to overcome the presumptive invalidity of the classification." Hobson II, supra, at 24. See also, e.g., Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. State of Florida, 379 U.S. 184 (1964); Brown v. Board of Education, 347 U.S. 483 (1954); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); and Hawkins v. Town of Shaw, 437 F.2d 1286 (1971).

Classifications which discriminate against disadvantaged groups are subject to the most stringent judicial scrutiny. Judge Wright, in Hobson v. Hansen, 269 F.Supp. 401 (D. D.C. 1967), aff'd sub nom Smuck v. Hobson, 408 F.2d 175 (1969), set forth the reason for this at 507-8:

> The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure - a term which need carry no disparaging or abusive overtones - may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary. 21/

21/ This additional scrutiny is particularly warranted where, as here, a history of past racial discrimination in the provision of public education is found. As Judge Edgerton noted in his dissent in Carr v. Corning, 182 F.2d 14, 29 (1950), such discrimination by the District of Columbia public schools (continued)

Moreover, in United States v. Thompson, Docket No. 71-1182, decided on October 7, 1971, the United States Court of Appeals for the District of Columbia Circuit held that discriminatory classifications affecting the District's voteless residents must be subjected to the strictest possible review.[22] In finding that classifications which discriminate against District residents are particularly suspect, the Court stated:

> Although the courts have a vital role to play in preserving our constitutional rights, we normally depend upon the vote as 'preservative of other basic civil and political rights.' Minorities can usually protect themselves by playing their role in the political process and forming coalitions with other groups to secure a majority. But it is senseless to remit District residents to the political process, since for them there is no political process. . . . The principle of majority rule loses its

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21/ continued
encompassed the education furnished to exceptional, as well as normal, children:

> Colored children in need of special services (visiting instructors, speech correction, remedial reading, lip reading and individual child study) are severely handicapped in comparison with white children of like needs. In 1947-48 such services were furnished to 3,431 white children by 43 workers and 3 special supervisors. They were furnished to 4,031 colored children by 15 workers and 1 special supervisor. In 'ungraded' classes for children not adjusted to the standard curriculum there were in October, 1948, 1,145 children in white elementary schools, 474 in colored elementary schools.

[22] The Court reasoned at 13 of the Slip Opinion that:

> The residents of Washington occupy a profoundly anomalous position in the federal system, and any classification which discriminates against them is particularly suspect. Writing for the Court in Reynolds v. Sims, supra, Chief Justice Warren observed: 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' . . . But for residents of the District, the right to vote in congressional elections is not merely restricted - it is totally denied. This regrettable situation is a product of historical and legal forces over which this court has no control. See J.S. Young, The Washington Community 1800-1828 at 14-15 (1966). Until it is changed, however, the standard of review in equal protection cases involving the District may well be fundamentally affected. See D.C. Federation of Civic Associations, Inc. v. Volpe, . . .

> legitimacy when not all the votes are counted. See "Developments in the Law-Equal Protection," 82 Harv.L.Rev. 1065, 1124-1126 & n.275 (1969). In this context, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating. Therefore, discriminatory classifications affecting District residents must be subjected to the strictest possible review. See Hobson v. Hansen, D.D.C., 269 F.Supp. 401, 508 & n.198 (1967), affirmed, sub nom Smuck v. Hobson, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969) (en banc). It is not enough for such classifications to be merely rational or even plausible; the justification offered must actually be convincing. Otherwise, the danger of 'experimentation' with the rights of the voiceless residents of the District is too great to be tolerated. at 14.

In note 20, the Court added:

> Nor is the fact that over 70% of District residents are black wholly irrelevant to our disposition of this case. Blacks are the one minority group which has been most consistently frozen out of the political process, even in jurisdictions where their formal right to vote has not been infringed.

Children in the District of Columbia constitute perhaps the most vulnerable group in society. They are a voiceless and invisible minority unable to protect their interests by participating in the usual political processes; therefore, they must be candidates for special protection by the judiciary. Children with acquired or inborn intellectual, emotional, physical or mental deficiencies, regarded historically with prejudice and irrationally subjected to discrimination, constitute a discernible minority to whom the political processes may never be open. Consequently, the Fifth Amendment demands a strict scrutiny of any state action which withholds from them the opportunity to receive basic rights. United States v. Carolene Products, 304 U.S. 144, 155 N.4 (1938).

That education is a fundamental right requires little extended discussion here. And there can be no doubt that courts have recognized that education is a critical commodity which must be zealously safeguarded from arbitrary or unreasonable denial or restriction. Suffice to say, as the Court put it in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954): "Education is perhaps the most important function of state and local government. . . . In these days, it is doubtful that *any* child may reasonably be expected to succeed in life if he is denied the opprtunity of an education." Education effectively undergirds the exercise of all other basic rights: speech, association, travel and, as the circumstances of plaintiffs here clearly illustrate, liberty and life itself. Without education, neither formal adjustment to the environment nor citizenship, self-realization or even gainful employment is in this day possible. One would be hard put, as the Court noted, to conjure any right more fundamental in this society. Similarly, the laws of each state in the United States recognize education as fundamental, so fundamental that the laws of all but two make education compulsory for at least ten years of each person's life.

Where such a vital interest is at stake, there must be a compelling justification for its denial to some children. See, *e.g.*, *Griffin* v. *County School Board of Prince Edwards County*, 377 U.S. 218 (1964); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Lee* v. *Macon County Board of Education*, 231 F.Supp. 743 (M.D. Ala. 1964); *Hall* v. *St. Helena Parish School Board*, 197 F.Supp. 649 (E.D.La. 1961), *aff'd* 368 U.S. 515 (1962). In the *St. Helena Parish* case, *supra*, the Court stated at 659: "When the state provides a benefit, it must do so evenhandedly." And in the *Lee* case, *supra*, at 754, it said " . . . as long as the State of Alabama maintains a public school system it cannot make public education 'unavailable' for a class of citizens."

For these reasons, the Federal Courts in *Hoosier* v. *Evans*, 314 F.Supp. 316 (D. V.I. 1970), Ordway v. Hargraves, C.A. 71-540-C (D.Mass. March 11, 1971) (copy attached), and Hobson v. Hansen, 269 F.Supp. 401, 507 (D. D.C. 1967) have held that the interest in education is so fundamental that a classification which affects educational opportunity must be subjected to the strictest standard of review.[23/]

Similarly, the strictest scrutiny is required because the effect of Defendants' actions results in a suspect wealth classification: plaintiff children are obliged to purchase, if they are able, whatever education they receive, while the state offers all others a public education free. Thus, it is the poor who lose all opportunity to be educated.

Although the strict standard of "compelling justification" is applicable in this case, Defendants' actions deny plaintiffs equal protection either under this standard or that of unreasonableness: they deny a publicly-supported education to plaintiff class while granting it to all other children, both normal and handicapped, in the District of Columbia.

1. By its total denial of a publicly-supported education to plaintiffs while granting it to all others, the District of Columbia deprives these children of the equal protection of the laws.

Acquired or inborn intellectual, emotional, physical or mental deficiencies do not provide sufficient justification for denying any child all access to realization of his individual

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[23/] The District Court for Massachusetts, in voiding a high school student's suspension, stated: "It is beyond argument that the right to receive a public school education is a basic personal right or liberty." Ordway v. Hargraves, supra. See, also, Serrano v. Priest, 40 USLW 2128-2129 (Cal.Sup.Ct. August 30, 1971), invalidating a public school financing system, where the Court said: "It cannot now be denied that the right to an education is a fundamental right."

potential.[24] Plaintiff children share in common with all other children the capacity for improvement of skills and of self with education. Each member of the excluded class has counterparts, among others similarly situated, who are in some school and are learning. Thus, the fact of intellectual or learning impairment or deficiency provides no rationale for the total exclusion of plaintiffs from publicly-supported education.

Administrative convenience is no justification either.[25] Such convenience can only be a means to an end, the education of children; the inconvenience of educating exceptional children is not a legitimate justification for their exclusion in and of itself.

The sole justification actually relied upon by Defendants for excluding plaintiff children is an asserted lack of resources to provide for their education. See Ruling on Motion to Intervene, Hobson v. Hansen, supra, at 3:

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[24] To discriminate against these children undercuts the basic purpose of public education. The aim of education is not to take standardized human raw material and turn it into standardized finished products, but rather to develop each individual's potential. Past Supreme Court cases have stressed the need for state education systems to accept diversity among their students. In Meyer v. Nebraska, 262 U.S. 390 at 402 (1923), the Court rejected the idea that the purpose of public education was to "foster a homogeneous people" and insisted that a foreign language could be taught in schools. It talked of the "right of an individual to acquire useful knowledge." In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court insisted that parents could send children to private schools; see also West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-2 (1943); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). If religious, ethnic and intellectual diversity is to be honored within the framework of the public school system, so must diversity in intellectual inheritance. There is no justification for turning away children from the right to education solely because of their mental birthrights. The same, of course, is true for children with acquired intellectual or emotional deficiencies.

[25] The Court in Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970), in rejecting the government's contention that denial of pre-termination welfare hearings was necessary "to conserve the fisc and administrative time and energy," required Constitutional rights to be afforded despite the "greater expense" they would generate.

> Defendants concede that petitioners are exceptional children who have been denied placement in a special public school program or a private educational facility financed by a tuition grant. They assert their action is required 'because all special classroom space is occupied, tuition grant funds are exhausted, and no funds exist to hire special teachers, and because Congress has not appropriated additional funds for special education . . .'

Judge Wright accurately described the gravamen of plaintiffs' case as "a claim that these Petitioners are being deprived of such education as they are capable of accepting . . . simply because defendants have not provided sufficient funds and facilities to comply with their obligation under the law to educate these exceptional children to the extent possible."

The crux of the issue separating plaintiffs and Defendants in this suit may be found in the latter's assumption that plaintiffs may be denied education altogether on the basis of insufficient funds, and be considered separately from children in regular classrooms who must always be accommodated despite financial problems.

The School Board would not suggest that it could deny education altogether to some "ordinary" children on the same basis that it is denied to plaintiffs. Yet it maintains that because a child is disadvantaged by a behavioral, mental or physical handicap, it may totally ignore or avoid his education. Plaintiffs maintain that the District's resources must be applied to all eligible school age children in compliance with the Constitutional command of equal protection, so that each receives the education which he is able to absorb. If, for example, instead of the expected decline in students this year,[26] an unexpected influx of students entered the system, the Public Schools could not close their doors to them on the ground of lack of funds. They must provide schooling for all.[27]

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[26] School officials here experienced a decline in overall pupil enrollment in the 1971-72 school year, due to general population loss and accelerated migration to the suburbs. In the District, there are approximately 7,300 teachers and 143,500 pupils in the public school system. The Washington Post, August 30, 1971, at A-17.

In *Hoosier* v. *Evans*, *supra*, the District Court squarely rejected the argument that the admission of excluded alien plaintiffs and their class of perhaps nine hundred children to public schools would create an undue burden on public education facilities. To Defendants' proferred justification, the Court answered at 320-321:

> [F]undamental rights guaranteed by the Constitution may be neither denied nor abridged solely because their implementation requires the expenditure of public funds. For such purposes, the Government must raise the funds. *Griffin* v. *County School Board*, 377 U.S. 218, 84 S.Ct. 1226 (1964); *United States* v. *School District 151 of Cook County*, (D.C. N.D. Ill., E.D.) 301 F.Supp. 201, 232 (1969). What defendants advance as an inescapable conclusion -- 'that relief must be denied . . . until such time as the educational facilities are adequate' . . . I reject out of hand as constitutionally impermissible, once the plaintiffs' right be established. These litigants may not be relegated to such a state of neglect, benign or otherwise.

Here, too, Defendants cannot constitutionally justify their unequal treatment of the plaintiffs by asserting that their discrimination serves the purpose of conserving the fiscal integrity of the District government. Although the District has a valid interest in preserving its financial resources, it cannot do so in a manner that creates invidious distinctions between classes of its citizens or which treats members of the same class unequally.

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[27] Compare *Knight* v. *Board of Education*, 48 FRD 108, 115 (E.D. N.Y. 1969), where the Court, relying solely on due process violations, invoked its broad equity powers to invalidate the exclusion of 670 children, an exclusion intended to relieve overcrowding, and ordered immediate reinstatement of the excluded children and the provision of an opportunity for compensatory education to make up for the period of wrongful exclusion.

Providing educational opportunities to some exceptional children and not others, as is presently done, violates equal protection in the most basic sense.28/ It is the same as administering a welfare system on a first come, first served basis. Denying education to handicapped children is like refusing publi health care or fire protection where the patient is so sick or the fire so devastating that it costs more than usual to provide the necessary service. It is not enough that a classification may save the District money. As the Court made patently clear i *Shapiro* v. *Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 1330 (1969),29/ the classification must also have some independently

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28/ The U.S. Court of Appeals for the Second Circuit has suggest that a smaller tuition grant to a handicapped child for private schooling than the cost of teaching his counterparts in public schools may violate the Equal Protection Clause. *McMillan* v. *Board of Education*, 430 F.2d 1145 (2nd Cir. 1970):

> Granted that a state which gives financial aid for the private education of handicapped children unable to attend classes in public schools may have to establish some maximum, *Cf*. *Dandridge* v. *Williams*, *supra*, 397 U.S. 471, since the cost of private education of a child with a particular constellation of handicaps might be astronomical, is there rational basis for a ceiling lower than the cost that would have been incurred in maintaining the child in the most closely related type of public school class?
> at 1149-1150

29/ The *Shapiro* case would not allow welfare benefits to be restricted to persons resident within the state for over a year. The Court refused to allow the state to discriminate on the ground that these persons might present the most expensive cases in the long run.

> Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first year of residence are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-term residents will not be impaired by a substantial influx of indigent newcomers. 394 U.S. at 627-628.

See also *King* v. *Smith*, 392 U.S. 309 (1968), in which the Court would not allow a man-in-the-house rule as a disqualifier for welfare despite the state's assertion that it was:

(continued)

rational basis:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

The classification contested here has no independent rational basis. Accordingly, it must fall.

The District's declared purpose, its only legitimate purpose, is the education of children. Where, then, is the legitimacy in excluding plaintiff children from public education altogether? As all plaintiff children are in need of and can benefit from education, where is the rational distinction betweer plaintiff children who are excluded and all other children? As plaintiff children undeniably have a fundamental interest in thei education, why is it necessary for the District to exclude plaintiff children from a public education altogether? Like

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29/(continued)

> . . . a legitimate way of allocating its limited resources available for AFDC assistance, in that it reduces caseloads of its social workers and provides increased benefits to those still eligible for assistance.

The *Shapiro* holding is not blunted by the later holding in *Dandridge* v. *Williams*, 397 U.S. 471 (1971) allowing states to impose a maximum ceiling on welfare allotments. That case, the Court was careful to point out, although it

> . . . involve[s] the validity of a method used by Maryland, in the administration of an aspect of its public welfare program, to reconcile the demands of its needy citizens with the finite resources available to meet those demands [,]

did not deal with a situation where aid was altogether denied some members of the class. In fact the Court said specifically at 481:

> So long as *some* aid is provided to *all* eligible families and *all* eligible children, the statute itself is not violated. [Emphasis supplie

racial discrimination, a discrimination based on intellectual deficiency, emotional status, or physical capacity should be extremely suspect, especially when the result, as here, is total exclusion. What compelling state interest, or what interest at all, is promoted by the exclusion of plaintiff children?

Rather than excluding plaintiff children altogether from public education, the Constitution commands that the right to a public education pursuant to Rule 1.1, Chapter XIII, of the Board of Education Rules, be secured for all children. The District must be made to ensure the availability of a publicly-supported education to each child in a regular public school, a special class, a school for exceptional children, an approved private school outside the public schools, a special institution, or the home. Having undertaken its required responsibility to educate all its children, the District may not now disclaim that duty invidiously, thereby depriving plaintiff class of the benefits of education.

2. By denying a publicly-supported education to plaintiff children, while granting it to a substantial number of exceptional children, the District denies to plaintiffs equal protection under the laws.

So far as Defendants might seek to justify the exclusion of plaintiffs on the assertion that plaintiffs are mentally or physically handicapped and thus different, the justification fails to explain why over 4,000 equally "different" children are being provided a public education.[30/] Indeed, Defendants, in their reports on special education, recognize their obligation to provide special education programs to serve those pupils

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[30/] See note 4, *infra*, at 4.

whose "patterns of educational needs are very different from those of the majority of children and youth." 31/ Plaintiff children fall within the range of intelligence and skill possessed by children presently served by the school system; yet they continue to be excluded from public education. This unequal treatment of children cannot be justified under either standard of review.

3. By denying an education altogether to plaintiff children who cannot afford a private education, the District denies to them equal protection under the law.

The District denies to these children all opportunity for an education; plaintiff children will never receive any education at all because of their parents' inability to afford private instruction. For the indigent plaintiff, this is not merely a case of unconscionable and unequal treatment at the hands of the state; this is total deprivation of all opportunity for even a modicum of self-care, independence or self-sufficiency. 32/

31/ Public Schools of the District of Columbia, "Special Education Information Bulletin, 1970-71," at 5.

32/ See Michelman, "Supreme Court, 1968 Term, Foreword: Protecting the Poor Through the Fourteenth Amendment," 83 Harv.L.Rev. 7 (1969).

B. DEFENDANTS EXCLUDE PLAINTIFF CHILDREN IN VIOLATION OF THE STATUTES OF THE DISTRICT OF COLUMBIA.

By withholding access to a publicly-supported education, Defendants violate plaintiff children's rights under the pertinent statutes, rules and policies of the District of Columbia. In particular, Section 31-201 of the D.C. Code provides that:

> Every parent, guardian, or other person residing permanently or temporarily in the District of Columbia who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or parochial school or instructed privately during the period of each year in which the public schools of the District of Columbia are in session: . . . .

The statutory exceptions to §31-201 are quite limited. A child may be "excused" from attendance only when

> . . . . upon examination ordered by . . . . [the Board of Education of the District of Columbia], [the child] is found to be unable mentally or physically to profit from attendance at school: Provided, however, that if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall attend upon such instruction. D.C. Code §31-203.

This obligation to provide an education for all children suited to their capacities is reaffirmed in Board Rules 14.1 and 14.3, Chapter XIII.[33] Defendants have an obligation to provide whatever specialized instruction will benefit the child, and the failure of

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[33] 14.1 - Every parent, guardian, or other person residing permanently or temporarily in the District of Columbia who has custody or control of a child residing in the District of Columbia between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately during the period of each year in which the Public Schools of the District of Columbia are in session, provided that instruction given in such private or parochial school, or privately, is deemed reasonably equivalent by the Board of Education to the instruction given in the Public Schools.

14.3 - The Board of Education of the District of Columbia may, upon written recommendation of the Superintendent of Schools, issue a certificate excusing from attendance at school a child who, upon examination by the Department of Pupil Appraisal, Study, and Attendance or by the Department of Public Health of the District of Columbia, is found to be unable mentally or physically to profit from attendance at school: Provided, however, that if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall be required to attend such classes.

Defendants to so provide a public education is a clear violation of the law. Cf. Alexander v. Thompson, 313 F.Supp. 1389 (D.Cal. 1970); Wolf v. The Legislature of the State of Utah, (3d District, Salt Lake County, Utah) (Civ. No. 182646, Jan. 8, 1969) (copy attached).[34/]

Board of Education Rule 1.1, Chapter XIII, expressly provides that

> All children of the ages hereinafter prescribed who are bona fide residents of the District of Columbia are entitled to admission and free tuition in the Public Schools of the District of Columbia, subject to the rules, regulations, and orders of the Board of Education and the applicable statutes.

This right to admission to the public schools, clearly stated in Rules 1.1, 14.1 and 14.3, supra, is not limited to admission to regular classes of a uniform type. Rather the Board of Education Rules and policies contemplate and require the provision of special education services for those exceptional children in need of such class assignment.[35/] Moreover, the District's Compulsory School Attendance Law, D.C. Code §31-203, although phrased in terms of a parent's or guardian's duty to "cause such child to be regularly instructed," clearly carries with it the concurrent duty on the part of the District to provide a public

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[34/] In Doe v. Board of School Directors of Milwaukee, No. 377770 (Milwaukee Cir.Ct. 1970) (Temporary Injunction), the Court similarly found that a retarded child then on the waiting list for special education classes must be admitted to such classes. (copy attached)

[35/] 11.1 - Pupils who are habitual truants, or who are wilfully and habitually absent from school, or who cannot be controlled by the regular school discipline while in attendance upon school may be transferred to a special class or school.

11.2 - Pupils with serious mental or physical defects may be assigned to special classes after appropriate examination.

school system.[36] It was enacted at a time when such a public school system existed,[37] and by no stretch of interpretation was it intended to require parents to undergo the cost of private education under the threat of criminal sanctions if they could not afford it. The clear aim of the law is to ensure to each child his right to an education against any infringement either by a parent or guardian or by the District of Columbia itself.

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[36] The law further recognizes the obligation to provide special education to children such as plaintiffs because it exempts children "found to be unable mentally or physically to profit from attendance at school" from having to attend regular classes but expressly requires those who "may benefit from specialized instruction adapted to his needs" to "attend upon such instruction." This clause requires the school system to make provision for this specialized instruction either in its own system or by providing the financial means for the parent to obtain it elsewhere. Unless this interpretation were correct, the parent would be committing a crime by refusing to enroll the retarded child in private school regardless of his means or the costs of such private schooling, a patently unfair and very possibly unconstitutional result.

[37] In 1925 when the compulsory education law was passed, special education was already being provided by the District of Columbia Government for blind, deaf, and physically cripped children of school age. See, *e.g.*, D.C. §31-1008. See also D.C. Code §§31-1110, 31-1111, and 31-1113, which, while unconstitutionally establishing segregated schools for "colored" and white children, did recognize an absolute right of all children in both races to attend some school.

C. DEFENDANTS' FAILURE TO PROVIDE FOR THE EDUCATION OF CHILDREN WHO ARE THEIR WARDS, COMMITTED TO THE DEPARTMENT OF HUMAN RESOURCES, SOCIAL SERVICES ADMINISTRATION, VIOLATES CONSTITUTIONAL AND STATUTORY MANDATES.

Wards of the District of Columbia enjoy no less a right to the benefits of education than do other children. Defendant employees of the Department of Human Resources, Social Service Administration (SSA), by mandate of Congress, are under a duty to act as guardians to dependent and neglected children committed to their care.[38/] Such children, as wards of the District of Columbia, remain in the custody of the SSA until discharged from further commitment. Section 31-201 of the District of Columbia Code expressly provides that a guardian or other person who has custody or control of a child of compulsory school age shall cause that child to be regularly instructed. Under D.C. Code §16-2301 (21) (Supp.IV), a custodian who is acting _in loco parentis_ is vested with responsibility for the custody of a minor which includes:

> . . . .
> (B) the right and duty to protect, train, and discipline the minor; and
> (C) the responsibility to provide the minor with food, shelter, education, and ordinary medical care.

These duties are not waived where the guardian is the District of Columbia itself.

[38/] D.C. Code §3-117 specifically confers upon the Board [SSA]:

> full power (1) to accept for care, custody, and guardianship dependent or neglected children whose custody or parental control has been transferred to the Board, and to provide for the care and support of such children during their minority or during their term of commitment; . . . .

D.C. Code (Supp.IV) §3-116 provides that SSA:

> shall have the care and supervision of . . . all children who are destitute of suitable homes . . . whenever such children may be committed to the care of the Board by the Family Division of the Superior Court.

A child's confinement to an institution clearly does not exempt the authorities from the responsibility of providing him with appropriate education. Creek v. Stone, 126 U.S. App. D.C. 329, 379 F.2d 106 (1967); In Re Savoy, Nos. 70-4808, 70-4714 (Juv.Ct. D.C. 1970); In Re Gregory, No. 69-3250-J (Juv.Ct. D.C., Sept. 10, 1969).

SSA, when it assumes charge of a committed child, must provide such care as nearly equivalent to that which a parent should provide. Creek v. Stone, supra, at 334. It must undertake to provide a "decent measure of existence and subsistence" to its wards, including all the necessaries required by law of a custodian. In the Matter of D.C. Family Welfare Rights Organization v. Thompson, No. 71-1150-J (D.C. Sup.Ct., Fam. Div., June 18, 1971). Little discussion is required here to support the proposition that for helpless dependent children, access to a full, publicly-supported education is both a necessary and a fundamental right.

Education for the institutionalized child, because of his prior experience of abuse, neglect or environmental deficiency, is all the more essential to his healthy development. Such children require compensatory and supplemental education, not the denial of all education. As the Court in Hobson I, supra, at 471, 473, stated:

> . . . [u]nless these [disadvantaged] children are given intensive remedial instruction in basic skills, primarily in reading, and unless they are given the opportunity to enjoy some of life's experiences that will, by bringing them into contact with new things and concepts, stimulate verbal abilities, they will be condemned to a substandard education . . . . It is true that the schools alone cannot compensate for all the handicaps that are characteristic of the disadvantaged child; but it is the schools that must -- as defendants admit -- lead the attack on the verbal handicaps which are the major barrier to academic achievement.

The District's wards, like other children, are entitled to a full-scale educational program.[39/] Moreover, the authorities of the Social Services Administration have a variety of resources unavailable to the average parent, to provide such an educational opportunity. SSA has funds with which to obtain private instruction for its wards. It has knowledge of the specialized schools for the handicapped and contracts with several of these schools for those of its wards who require such instruction. It operates its own schools in some facilities, with teachers supplied by the Board of Education. It has professional staff to diagnose and to assess a child's educational needs. And, it has an intimate knowledge of and an ongoing staff liaison with the public school system which, by law, [D.C. Code §31-104(b)] is obliged to co-ordinate educational programs to insure an effective educational system in the District of Columbia.

Despite such resources, the Defendants have permitted or acquiesced in plaintiff wards' exclusion from public education for substantial periods of time.[40/] Such dereliction is incomprehensible and unconscionable. Yet, had these children's

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39/ See, e.g., In Re Savoy, supra; D.C. Code §31-1101. In its decision in In Re Gregory, supra, requiring that children detained in the Receiving Home Annex receive a full school day session, the Court found that:

> . . . children at the Receiving Home are being short-changed. Some provision should be made for the children to receive a similar type of education that they would receive in the community. . . . I don't think it is any defense for the Department to assume that because these children are in detention they should receive only two and one-half (2-1/2) hours of formal instruction instead of the usual five (5) hours of formal instruction.
> (at 2)

40/ See, e.g., the Affidavit of Scott concerning the exclusion of Peter , a Junior Village resident, and the Affidavit of Easter , at paragraphs 14 and 15,
(cont'd)

natural parents persisted in causing non-attendance, they could well be subject to fine or to neglect proceedings.

Defendants, with respect to District of Columbia wards, are, therefore, under a dual obligation to cease the violation of the Constitutional rights of their dependent wards. Defendants may choose to enroll their wards in the Public Schools of the District of Columbia, in private schools, or in instruction which is equivalent in all respects to that provided in the public schools. They may not, however, adopt the alternative of leaving their children in a bureaucratic limbo of days and months without schooling.

The administrative convenience of Defendants' existing placement practices is no justification for plaintiff wards' exclusion. Institutions, whose mission is to care for the neglected and dependent child, may not demur on the ground that they are unprepared to provide an education to their residents. Where the child's exceptional circumstances -- his past abuse, neglect or emotional disturbance -- is the very raison d'etre of his confinement, the District's authorities may not be heard to claim that appropriate educational programs or facilities are not available. Failure to educate such children threatens to delay their release, aggravate their impairments, and retard their prospects for self-sufficiency. Relief which will assure the immediate placement in appropriate educational programs of all those District wards without school programs should be granted.

40/ (cont.)
concerning the exclusion of Duane , a ward of SSA, attached to Verified Complaint, and the Affidavit of Lorraine concerning the exclusion of Joseph , Raymond and Allen , Junior Village residents previously excluded from school, attached hereto as Appendix T.

D. THE EXCLUSIONARY RULE OF THE DEFENDANT BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA EXCEEDS ITS UNDERLYING STATUTORY AUTHORITY AND VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

It is clear that Rule 18.1 exceeds the statutory authority governing school exclusion in the District of Columbia, D.C. Code §31-203, insofar as Defendants rely upon it to justify the unlawful exclusion of children from publicly-supported education. Rule 18.1 states that:

> The following offenses furnish sufficient cause for suspension or expulsion in cases to which the Compulsory School Attendance Act does not apply:
>
> 1. Immoral conduct
> 2. Indecent language
> 3. Violent or pointed opposition to authority
> 4. Persistent disobedience or disorder
> 5. Habitual tardiness
> 6. Unauthorized absence
> 7. Poor personal hygiene
> 8. Continuing academic failure
>
> Such suspension or expulsion shall be made only with the approval of the assistant superintendent concerned and shall be immediately reported in writing to the Superintendent of Schools.

Section 203 of the D.C. Code clearly allows Defendants to "excuse" a child only where he "is found to be unable mentally or physically to profit from attendance at school," and only if he cannot "benefit from specialized instruction." Defendants have utilized Rule 18.1 to create categories of excluded students which are totally beyond the purview of authorizing legislation. Furthermore, Rule 18.1 fails even to require a finding as to whether the suspended or expelled child can benefit from regular schooling or specialized instruction. Presumably, a student may be habitually tardy, use indecent language, be absent without authorization, or suffer from poor personal hygiene, and still be able to profit from schooling.

Moreover, the rule perverts the purpose of the statute. Section 203 allows the harsh sanction of exclusion only when regular public schooling is useless to students; Rule 18.1 would

allow exclusion when students are deemed useless to public s
Under the circumstances, the federal courts are not bound by
administrative agency's misreading of its governing statutes
Thus, to the extent that children have been denied access to
public education on the basis of Rule 18.1, those denials ar
lawful under D.C. Code §31-203 (1967 ed.). *Cf*. *Sullivan* v.
Houston Independent School District, 307 F.Supp. 1328 (S.D.
1969); *Alexander* v. *Thompson*, 313 F.Supp. 1389 (D. Cal. 1970

Board Rule 18.1 also violates the Due Process Clause o
Constitution of the United States in that it is arbitrary an
capricious, and void-for-vagueness. The void-for-vagueness
trine has come to signify two distinct legal concepts: 1) c
the reasonable application of the statute or regulation in
question be so broad as to reach constitutionally protected
activity; and 2) does the statute or regulation "forbid or r
quire the doing of an act in terms so vague that men of comm
intelligence must necessarily guess at its meaning and diffe
to its application . . . ." *Connally* v. *General Constructio*
269 U.S. 385, 46 S.Ct. 126 (1926). See generally *Zwicker* v.
Koota, 389 U.S. 241, 88 S.Ct. 391 (1967); *Sullivan* v. *Housto*
Independent School District, *supra*; Amsterdam, "The Void for
Vagueness Doctrine," 109 U.Pa.L.Rev. 67 (1960).

It is now well settled that regulations and rules appl
to public school students are subject to scrutiny for overbr
and vagueness. *Sullivan* v. *Houston Independent School Distri*
supra; *Crossen* v. *Fatsi*, 309 F.Supp. 114 (D. Conn. 1970) (Dr
Code unconstitutionally overbroad and vague); *Soglin* v. *Kauf*
295 F.Supp. 978 (W.D. Wis. 1968) (prohibition of "misconduct
unconstitutionally overbroad and vague). Where, as here, st
dents are faced with the drastic penalty of exclusion for a

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41 / See, generally, Jaffe and Nathanson, *Administrative La*
(pp. 260-301), and cases cited therein.

substantial period of time, they have "no less a righ
clear specific normative statement . . . than does a
student or possibly even the accused in a criminal ca
[I]f school officials contemplate severe punishment t
so on the basis of a rule which is drawn so as to rea
inform the student what specific conduct is prescribe
Sullivan v. Houston Independent School District, supr

Board of Education Rule 18.1 is a model of admi
ambiguity. In effect, school children are informed t
must be virtuous. They must behave morally, employ d
language, be obedient, and engage in no "pointed" opp
authority. There is no further definition of these t
school system is free to give whatever content to the
hibitions it pleases. The vagaries of this rule clea
stitute a violation of due process of law in that rea
would radically differ on its proper application. Se
Kauffman, supra; Crossen v. Fatsi, supra.

Moreover, Rule 18.1 is clearly so broad that it
constitutionally protected conduct. Exercise of free
speech may include what some would characterize as "i
language." See, e.g., Scoville v. Board of Education
10 (7th Cir. 1970) (en banc). Organized opposition t
in Vietnam, with the attendant symbols of that opposi
bands, newspapers) may be "pointed opposition to auth
yet, even in schools, this is constitutionally guaran
material disruption results. Tinker v. Des Moines In
Community School District, supra. Rule 18.1, in ligh
overbreadth, clearly reaches constitutionally guarant
and expression. Richards v. Thurston, 424 F.2d 1281
1970) (pupil cannot be excluded for long hair)

Rule 18.1 is also arbitrary and capricious and
violative of the due process clause. It fixes penalt

bear no perceivable relationship to the conduct it proscribes "Unauthorized absence" and "habitual tardiness," prohibited presumably to maximize hours of instruction, are punished by officially required absence -- exclusion for substantial peri of time. Academic failure is treated by less, not more, scho ing. Poor personal hygiene is attacked by suspension or expu not instruction or medical treatment. In sum, the rule is neither therapeutic nor even punitive in traditional terms; i merely banishes "problems" without regard to their nature or the injury inflicted on the child. [42] Such arbitrariness a evidenced by the exclusion of plaintiffs and their class [43] clearly deprives them of due process of law.

E. DEFENDANTS, BY FAILING TO PROVIDE ANY ADEQUATE FAIR HEARING PRIOR TO EXCLUSION OR REASSIGNMENT, OR PERIODIC REVIEW THEREAFTER, DENY PLAINTIFFS DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES

In addition to the impropriety of the total denial of a publicly-supported education, the failure to provide any adeq

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[42] Thus, the Board must be required to rewrite its rules t define the kind of behavior which justifies suspension or expulsion from regular schooling to insure that teachers, administrators, and students will have sufficient notice of the conduct which precipitates such sanctions. In addition, at a minimum, provision must be made for interim instruction by me of tutoring or special classes for those of school age suspen or expelled for a period greater than two full school days. Compare the requirement of Judge Greene in In Re Savoy, supra for 4-1/2 hours educational program per day for inmates of th juvenile detention home, and Judge Fauntleroy's similar requirement for Receiving Home Annex detainees in In Re Gregory, sup Thus, children of school age who have allegedly committed suc serious crimes that they are not allowed to remain in the community are still guaranteed their educational rights. Ironically, less serious behavior which is not referred to th court or which does not result in detention may result in gre educational deprivation by the denial of such rights altogeth through school action.

[43] Plaintiffs, furthermore, have never been adequately informed and do not know for what reason and under what Board R or practice they have been excluded.

hearing prior to exclusion or classification into a speci
education program[44] is violative of plaintiffs' right to
process of law. *Cf*. *Cafeteria and Restaurant Workers, Lo*
v. *McElroy*, 367 U.S. 886, 895 (1961); *Green* v. *McElroy*, 3
474, 496 (1959). Courts have consistently held that a fu
fair hearing is due students before their suspension or e
from public schools.[45]

At a minimum, pupils facing suspension or expulsion
regular classes, for any reason, have a right to know and
heard on the specific bases for their exclusion prior to
exclusion and to be informed of the availability of alter
instruction. See *Marlega* v. *Board of School Directors of*
waukee, C.A. No. 70-C-8 (E.D.Wis., Sept. 18, 1970) (Tempo
Restraining Order) (copy attached); *Soglin* v. *Kauffman*, 2
978 (1968); *Vought* v. *Van Buren Public Schools*, 306 F.Sup
(E.D. Mich. 1969) (Temporary Restraining Order). Also, s
generally *Williams* v. *Dade County School Board*, (5th Cir.

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[44] In *Hobson I*, the Court carefully examined the proce
which children were in "tracks" in order to evaluate the
and justifications for its racial effects. Judge Wright'
order dissolving the then existing track system resulted
retesting of over 1,272 children assigned to the special
The tests disclosed that over two-thirds had been imprope
classified. *Smuck* v. *Hobson*, 408 F.2d 175 (D. D.C. 1969)
See also *Stewart* v. *Philips*, C.A.No. 70-1199-F (D. Mass.
Here we ask the Court to examine the process by which pla
children are placed in a "non-track" and denied access to
educational services, for an additional reason, namely th
constitutional guarantee of procedural due process.

[45] After full and adequate hearings, Defendants for go
could suspend a child from his present educational assign
reassign him to an alternative educational program with p
review of his status. Similarly, for students not yet in
system, Defendants, after full and adequate hearings, cou
assign them to specialized instruction adapted to their n
Only in the situation of short-term, emergency suspension
the student be temporarily barred from some classroom ins
The exclusion of school age children fromm all publicly-s
education for extended periods of time is, however, impro
must cease.

3 Cl.Rev. 161, July 1971; *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Wasson* v. *Trowbridge*, 382 F.2d 807 (2nd Cir. 1967); *Scoville* v. *Board of Education of Joliet*, 425 F.2d 10 (7th Cir. 1970) (en banc); *Woods* v. *Wright*, 334 F.2d 367 (5th Cir. 1964); *Banks* v. *Board of Public Instruction*, 314 F.Supp. 285 (D. Fla. 1970); *Stricklin* v. *Regents of University of Wisconsin*, 397 F.Supp. 416 (W.D. Wis. 1969); *King* v. *Saddleback Jr. College District*, 318 F.Supp. 89 (C.D. Col. 1970). The importance of a full hearing prior to the termination of a benefit granted by the state was recently reaffirmed by the Supreme Court. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare payments). The hearing prior to suspension or expulsion for misbehavior should include written notice to parents and child of the specific factual charges, the right to an advocate of the child's choice, the right to confront witnesses, access to school records, and an ultimate right of appeal to the Board of Education.

The importance of an opportunity for a full prior hearing is just as critical in the case of a child who is to be assigned to a special education program or is to be transferred out of the regular classroom. Presently, the District of Columbia not only deprives exceptional children of the benefit of all publicly-supported education without any periodic review of their status, but in addition (1) stigmatizes these children as emotionally disturbed, behaviorally unfit, mentally defective, untrainable, or otherwise unable to profit from further schooling and (2) deprives them of their only chance to gain whatever blessings of life their talents might bring with education. Thus, the District leaves them uneducated and inclines them toward becoming wards of the state or totally dependent on their families. The deprivation that results from total exclusion of these children is far greater than that which attaches to a record of disciplinary expulsion for distributing controversial magazines or newspapers where due process hearings are now required. See Scoville v. Board of Education, supra; Vought v. Van Buren Public Schools, supra; Sullivan v. Houston Independent School District, supra.

Recently, the Supreme Court referred to the necessity of a full prior hearing before the state stigmatizes any person. Wisconsin v. Constantineau, 91 S.Ct. 507 (Jan. 19, 1971). In that case, the Court ruled that a Wisconsin law requiring the posting of the names of alleged problem drinkers in taverns and package stores for the purpose of preventing the sale of liquor to them constituted stigmatization serious enough to require due process. Posting, under Wisconsin practice, was done without prior notice or hearing, at the request of any one of a number of minor officials, elected or appointed, or at the request of the spouse of the alleged drinker.

The Constantineau reasoning was recently applied by a federal district court in Boston in denying a defendant's motion to dismiss a complaint which sought, in part, to require the Boston school system to provide a prior hearing for children classified as retarded. Stewart v. Phillips, ___ F.Supp. ___, Civil Action No. 70-1199-F (D.C. Mass, February 8, 1971).

Further, in circumstances similar to the present case, (exclusion for "medical reasons"), a Wisconsin District Court ordered excluded children reinstated in public schools and a full hearing procedure prior to all future "medical" exclusions. Marlega v. Board of School Directors of Milwaukee, supra. That hearing procedure included the specification of the reasons for exclusion, provision for medical and psychological examination, the right to be represented by counsel, to confront and cross-examine witnesses and to present evidence and witnesses on the child's behalf, a stenographic record of the hearing, a final decision in writing detailing the reasons for an exclusion, and a specification of available public educational alternatives. Cf. Goldberg v. Kelly, supra. In the context of exclusion of children from regular classes or (as at present) from school altogether, no less process is due.

Thus, before a child can be classified as exceptional and removed from, or denied admission to, the regular classroom, the school should have the responsibility of notifying the parent of the specific nature of the child's problem, and of the reasons supporting its determination that he cannot be successfully served in the regular schoolroom. Any plans for, and results of, a medical, psychological, and educational assessment of the child must also be relayed to the parents, and the child's educational needs in the interim period during such an assessment must be provided for. The parent must also be [illegible] the specific educational plan for the child diagnosed as in need of special help. Periodic review of his progress with the aim of eventual reintegration into regular classes should also be required.[46] If the parent believes the classification or diagnosis to be erroneous, he should be entitled to a hearing at which he can rebut the school's evidence and present his own. Such a procedure is vital to ensure that every child receives an adequate educational placement.[47]

Under the special education program of the D.C. Public Schools, as it has been administered in the past, no such hearings have been held. Parents have not been participants in any orderly procedures allowing them the right to view and rebut any evidence of their child's alleged exceptional status. There has often appeared little rhyme or reason as to why some children are placed in special classes or given tuition grants and some placed on indefinite waiting lists, year after year, and given nothing at all. This past total lack of any "standards for selection among . . . candidates," together with the failure to "establish [a] fair and orderly procedure for allocating [the] supply" of special education classes or grants, is itself a violation of due process. Cf. Holmes v. N.Y.C. Housing Authority, 398 F.2d 262, 265 (2nd Cir. 1968):[48]

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[46] For a similar recommendation, see Memorandum from John L. Johnson to Hugh Scott, supra, Exhibit G , at 6.

[47] As the Court noted in Soglin v. Kauffman, supra, at 988:

> I take notice that in the present day, expulsion . . . or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is, in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.

> It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. See Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964). For this reason alone due process requires that selections among applicants be made in accordance with 'ascertainable standards,' id. at 612, and, in cases where many candidates are equally qualified under these standards, that further selections be made in some reasonable manner such as 'by lot or on the basis of the chronological order of application.' Hornsby v. Allen, 330 F.2d 55, 56 (5th Cir. 1964) (on petition for rehearing).

Thus, it would be minimally essential that regularized and openly visible regulations and procedures be adopted for assignment of children to special education classes, even if there were no basic right to education for all such children.

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[48] Among the due process deficiencies cited were failure to make available to prospective tenants regulations on admissions, failure to process applications chronologically or in accordance with ascertainable standards, automatic expiration of all applications within two years, failure to accord credit for past time on waiting lists to renewals of applications, no public waiting list by which an applicant can gauge the progress of his case or his status, and failure to inform applicants of determinations of ineligibility. Almost all of these deficiencies are characteristic of the administration of District special education programs.

The right to an education is so valuable that only the gravest of reasons may justify its denial even for a short period. Thus, courts have invalidated denial of the right to unwed pregnant girls, Ordway v. Hargraves, supra; Perry v. Granada, 300 F.Supp. 748 (D. Mass. 1969), or longhaired boys, Richards v. Thurston, supra. In general, there must be a "compelling justification" for such a denial, i.e., the safety of pupils or teacher, or the survival of order in the classroom as a teaching and learning prerequisite. And, even where removal of a misbehaving or disruptive child from the regular classroom is necessary, his right to an education of some kind survives and the constitutional requirement of a reasonable alternative to total exclusion from the educational process must be implemented.

The failure to provide such a prior hearing denies due process to plaintiffs and every member of the class they represent and requires that Defendants immediately provide these children public support for an educational opportunity. See Dixon v. Alabama State Board of Education, supra; Marlega v. Board of School Directors of Milwaukee, supra; Vought v. Van Buren Public Schools, supra; Knight v. Board of Education of the City of New York, 48 FRD 115 (S.D. N.Y. 1969).

F. DECLARATORY AND INJUNCTIVE REMEDIES ARE NECESSARY TO IMMEDIATELY AND PROSPECTIVELY PROTECT PLAINTIFFS FROM DENIAL OF THEIR DECLARED, CONSTITUTIONAL AND STATUTORY RIGHTS.

Constitutional rights are rights in the here and now; deprivation generally requires immediate redress. Watson v. City of Memphis, 373 U.S. 526, 532-33 (1963). The standard of promptness unquestionably applies to "school" cases. Green v. County School Board, 391 U.S. 430, 439 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Marlega v. Board of School Directors of Milwaukee, supra; Vought v. Van Buren Public Schools, supra; Ordway v. Hargraves, supra;

Hoosier v. *Evans*, 314 F.Supp. 316 (D. St. Croix, 1970); *Hobson II*, *supra*, at 25-26. *Cf*. *Brown II*, *supra*. It is long past time for Defendants to provide plaintiff children public support for some educational service and to overcome the effects of prior exclusion from all educational opportunity. *Cf*. *U.S.* v. *Jefferson County Board of Education*, 372 F.2d 836, 891-892, 900 (5th Cir. 1966), *aff'd en banc* 380 F.2d 385 (1967); *Knight* v. *Board of Education of City of New York*, *supra*.

The immediate concern is for a publicly-supported educational opportunity for all excluded children now. In the first instance, this necessarily means provision of public support for their education within the next several weeks.[49] In order to protect vital constitutional rights and prevent the irreparable harm inherent in their exclusion from all schooling from continuing further, an injunction is appropriate and necessary. See *Knight* v. *Board of Education of City of New York*, *supra*, at 108, 115; Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Henry v. Greensville Airport Commission, 284 F.2d 631 (4th Cir. 1960). But justice also requires the Court to order Defendants promptly to identify all children who are now excluded from all publicly-supported education, the length of such exclusions and the reasons therefor, and to notify their parents or guardians of their right to a publicly-supported education now and hereafter and to a hearing, as set forth more fully below. Cf. Knight v. Board of Education of the City of New York, supra, at 108. Only then will the Court be able to grant relief to the class named plaintiffs represent.[50]

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[49] Admission into programs of publicly-supported education of all presently excluded children for the 1971-72 school year is feasible. Many of the suspended children can be returned to regular classes with auxiliary supportive help. Special classes now existing for emotionally disturbed children can be expanded. Retarded children's classes can also be expanded and unused capacity in regular and special schools applied to programs for the retarded. Federal funding is also available for compensatory education programs for the handicapped or disadvantaged child under Titles I and III of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241.

As several of plaintiffs' affidavits indicate, private programs for special kinds of educational needs could be mobilized to help fill the vacuum if some funds on a per pupil basis were assured. The affidavit of Mrs. Kathryn Gorham indicates that on three different occasions in the past several years, programs were mounted to care for the educational needs of retarded children, only to be scrapped for lack of funds. Indeed, if even the normal per pupil expenditure were allocated to these children, such programs might be able to operate with the additional help of funds from other sources.

Retarded children in Montgomery County, Maryland, who are not accepted into the public school programs will be given the equivalent per pupil cost ($1400) for use in a private school. Interview with Mrs. Nicky Duvall, Secretary to the Supervisor of Pupil Personnel Services, Montgomery County, April 28, 1971. Virginia also gives automatic grants to retarded children. See Affidavits of Joanne Gendreau and Kathryn Gorham, attached to the Verified Complaint as Appendices O and Q.

Once a right and a violation have been shown, this Court has broad equity powers to shape a decree to meet the continuing problems of protecting the constitutional right of school age children to equality of educational opportunity. Swann v. Charlotte Mecklenberg Board of Education, 91 S.Ct. 1267 (1971). Cf. Hobson II, supra, at 26. The continuing violation here -- total exclusion from all education -- is so gross as to require particular and prompt judicial scrutiny, initiative, and firmness in fashioning appropriate relief.

The exercise of basic constitutional rights cannot be postponed to some indefinite date, as the teachings of Swann v. Shapiro make clear.[51] Here, as in Watson v. Memphis,

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[50] This may require public announcements (in English and foreign languages) and other outreach efforts to inform parents of their children's right to an educational opportunity.

[51] There are numerous other examples of situations in which courts have refused to ignore or postpone the legal and constitutional rights of citizens solely because the state pleaded lack of resources to implement them. In Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970), the U.S. District Court refused to sanction inhumane prison conditions on the ground that they were due to lack of legislative appropriations.

> On the merits, Respondents do not contend that they are operating a 'good' prison or a 'modern' prison. With commendable candor they concede that many of the conditions existing at the Penitentiary are bad. However, they deny that they are operating an unconstitutional prison

(continued)

373 U.S. 526 (1963), where the Court also refused to accept an argument that an inadequacy of funds to provide for the

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51 / Continued:

> or are engaging in unconstitutional practices. They say they are doing the best they can with extremely limited funds and personnel. They point, justly, to the fact that over the past several years a number of significant improvements have been made within the System and they say that more are in the offing. at 365.

The State was required to produce a plan to overcome constitutional infirmities in the conditions under which prisoners were housed along with a timetable in which they intended to accomplish that aim. The Court concluded:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States. at 385.

See also Justice Blackmun's opinion in Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (use of corporal punishment as disciplinary measure in prisons):

> We are not convinced contrarily by any suggestion that the State . . . is too poor to provide other accepted means of prisoner regulation. Humane considerations and civil rights are not, in this day, to be measured or limited by dollar considerations. at 580.

Similarly, in this jurisdiction, Chief Judge Harold Greene of the D.C. Superior Court ordered adequate educational and recreational services at the Juvenile Receiving Home even though such services had not been budgeted for:

> [T]he responsibility for determining whether an acceptable home substitute had been provided is imposed by statute upon the Juvenile Court. In discharging that responsibility, the Court must, of course, take account of the judgments made by the institutional authorities, and it may act only on the basis of standards that are reasonable and not fanciful. But the Court is precluded from simply deferring to administrative or budgetary decisions made by those in charge of administering [the Receiving Home] and considering them to be the measure of what is 'possible.' To do so would be to surrender the Court's responsibility to others. In Re Savoy, J.Ct. Docket Nos. 70-4808, 70-4714 (1970)

See also Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); and Commonwealth ex. rel. Carroll v. Tatte, 442 Pa. 45, 274 A.2d 193 (1971) (Pennsylvania judges awarded mandamus to compel city officials to appropriate enough funds to administer court adequately):

> The judiciary must possess inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer justice, if it is to be in reality a co-equal, independent Branch of our Government. at 197.

additional supervision needed at the integrated municipal facilities should defeat the constitutional rights,

> . . . it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive to the needs of all its citizens. at 537-538.

At present, the amount of money being budgeted for special education both within and without the public school system itself is patently inadequate to the numbers of children who need such education.[52] See attached letter of Dr. Hugh Scott to the Board of Education, August 10, 1971:

> The problem we currently face is that the demand for special education services far outweighs the present resources available to the school system, both personnel and financial.

It is the total repudiation of any responsibility for the exceptional child and his relegation to a category of special education where, in the discretion of the system, he may receive no education at all, that is at the base of the District's lack of resources for this category of children. To meet the Constitutional command of equal educational opportunity, the public schools must take into account every child of school age when classroom space and teachers are computed.[53] Once the District is required to plan for and admit all children of school age regardless of handicap, it will be in a far better position to request and obtain per pupil expenditures that are reasonable for all children instead of pleading for additional funds for a category called Special Education which invariably has relegated countless hundreds of needy children to the limbo of the waiting list with no money at all allocated to their needs.[54]

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[52] Furthermore, Defendant Board of Education's "Financial Reports for Regular Appropriated and Federal Funds for the Ten Month Period Ended April 30, 1971 (FY 1971)"clearly disclose that substantial sums of money appropriated for special education have not been spent. According to this report and exhibit, prepared by Defendants' own Department of Budget and Legislation, a 1.7 million dollar underobligation of regular Congressional appropriations for Special Education programs has been projected for the 1971 fiscal year. See Exhibit J.

[53] The amount of money over and above the per pupil expenditure required for the special education of children who cannot be educated in regular classrooms would then not be as formidable a financial obstacle as it is now made to appear.

In cases of school exclusion, the courts have unequivocally declared that fundamental rights guaranteed by the Constitution may not be denied or abridged soley because their implementation requires the expenditure of public funds.[55] *Hoosier* v. *Evans*, *supra*. See, *e.g.*, *Griffin* v. *County School Board of Prince Edwards County*, 377 U.S. 218 (1964) (District Court may require county supervisors to exercise their power to levy taxes to raise funds adequate to maintain public school system); *United States* v. *School District 151 of Cook County*, *supra*.

Hobson v. *Hansen*, *supra*, has already mandated that school funds be equally distributed among pupils in different parts of the city. And, in a recent decision, the Supreme Court of California struck down a public school financing system, based on local property taxes, which discriminated against pupils located in poorer districts. *Serrano* v. *Priest*, 40 LW 2128 (August 30, 1971).

Here, allocation of resources which gives children no money at all for education is just as discriminatory. Accord-

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[54] See Affidavits of Robert Bostick and Bobbie McMahan, attached to the Verified Complaint as Appendices L, M and S.

[55] And see also *Holt* v. *Sarver*, *supra*, at 383, where a District Court, in refusing to sanction inhumane prison condition stated:

> It is obvious that money will be required to meet the constitutional deficiencies of the institution, and there is no reason to believe that, subject to the overall financial needs and requirements of the State, the Legislature will be unwilling to appropriate necessary funds.

-ingly, the Board must be required to allocate its resources so as to provide plaintiffs with access to a suitable program of public schooling. If additional funds are necessary, they must be raised or redirected from those already committed to the support of the education of all children. Hoosier v. Evans, supra; Griffins v. County School Board of Prince Edwards County, supra.

Constitutional rights which are recognized in theory but ignored in practice are denied as surely as those which are not acknowledged at all. Rights which may cost money to enforce are not thereby exempted from the guarantees of due process and equal protection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Verified Complaint, affidavits, and exhibits attached thereto, were mailed, postage prepaid, this 21st day of October, 1971, to Stephen Shane Stark, District Building, Washington, D.C. 20004, Attorney for Defendants.

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1 d.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER MILLS, et al.,
Plaintiffs,
v.
BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA, et al.,
Defendants.

Civil Action No. 1939-71

SUPPLEMENT TO MEMORANDUM IN SUPPORT OF VERIFIED COMPLAINT

A three-judge Federal Court has ruled that all Pennsylvania mentally retarded children are entitled to a free publi education. On October 7, 1971, Judges Broderick, Adams, and Masterson entered interim Orders approving a Consent Agreement and ordering injunctive relief requiring the Commonwealth of Pennsylvania to provide every retarded person from six to twenty-one years of age access to a free public program of education and training appropriate to his learning capacities. Pennsylvania Association for Retarded Children, et al., v. Commonwealth of Pennsylvania, et al., C.A.No. 71-42 (E.D. Pa. 1971) (copy attached)

The Court (whose decision is summarized, infra, under subheadings which correspond to those set forth in plaintiffs' Memorandum) enjoined Defendant local school districts and Defendant State education and welfare agencies from continuing practices and applying statutes so as to postpone, terminate, or in any way deny to any mentally retarded child access to a publicly-supported education.

Plaintiffs had sought preliminary and permanent injunct relief and declaratory judgment to end the denial of their equ right to education. They alleged that Defendants had refused retarded children free access to public education on the basis of certain laws, regulations, practices, and devices, the effe of which was to deny such children their rights to Equal Protection and procedural Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

The class consisted of every mentally retarded person a every person thought by Defendants to be mentally retarded, resident in the Commonwealth of Pennsylvania, aged six to twenty-one years, who had not been accorded access to a free public education, whether as a result of exclusion, postponeme excusal, or denial in any other fashion, formal or informal. The Court ordered Defendants to immediately reevaluate the thirteen named plaintiffs and to accord to each of them access to a free public educational program no later than six days fr the date of its Order. It further directed Defendants to provide education and training to the plaintiff class "as soon as possible," but in no event later than September, 1972. The Court thus compelled the Commonwealth to identify, to evaluate and to place a class estimated by plaintiffs to include as man as 53,000 children before the onset of the 1972-73 school year.[1/]

On June 18, 1971, an Order and Stipulation was entered requiring that notice and a due process hearing be provided to any retarded child prior to a change in his educational status

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[1/] *Pennsylvania Association for Retarded Children, et al.*, v *Commonwealth of Pennsylvania, et al.*, *supra*, Complaint, para. 8 at p. 5.

A full range of due process safeguards must now be accorded to each such child prior to any assignment or reassignment to special or regular education, or prior to a decision not to assign on the basis that a child is or is thought to be mentally retarded.[2]

By its Order of October 7, the Court affirmed the constitutional duty of Defendants to educate each retarded child residing in Pennsylvania. To the extent that statutes regulating such subjects as initial admissions to the public school, compulsory school attendance, tuition and tuition and maintenance grants, pre-school education, welfare department care for the retarded, and homebound instruction, on their face or as applied, served to postpone, terminate or deny the access of plaintiff children to a free public education, such statutes were struck down. The Court approved and recognized the conclusion that:

> It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training. (Para. 7)

That such education is of fundamental importance to these children is explicitly recognized by expert findings that:

> . . . all mentally retarded persons are capable of benefiting from a program of education and training; . . . the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; . . . the earlier such education and (cont'd)

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[2] Pennsylvania Association for Retarded Children, et al., v. Commonwealth of Pennsylvania, et al., supra, Order of June 18, 1971 (copy attached). See, discussion at pp. 7-9, infra (subheading E.).

> training begins, the more thoroughly and more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, . . . a mentally retarded person can benefit at any point in his life and development from a program of education and training. (Para. 4)

A.

The Order explicitly acknowledged that the Commonwealth undertook to provide a free public education to all of its children, normal and exceptional. (Para. 5) At paragraph 6, the Consent Agreement stated that:

> Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.

This obligation to provide a free educational program appropriate to the child's capacity may be satisfied by placement in one of a number of alternative programs of education and training, i.e., instruction provided in regular or special classes, or in welfare department administered, private tuition grant, or homebound programs. But a clear hierarchy of preferability among these alternatives is set out. (Paras. 7 and 33)

In the event that a child is denied admission to a regular education, the authorities are required to provide him with a "timely placement" to some other free public program of education and training. (Para. 13)

Likewise, in the event that a decision is made to deny or withdraw payment of tuition or tuition and maintenance, the local school district in which the exceptional child resides must provide "a program of special education and training appropriate to the child's learning capacities into which the child may be placed." (Para. 28)

B.

The Court ordered Defendants to cease and desist from applying the Compulsory School Attendance law so as to deny plaintiffs access to a free public education. Exceptions to the Compulsory School Attendance law, similar to those in the District of Columbia Code,[3] can not be invoked by Defendants, contrary to the parents' wishes, so as to postpone, terminate, or in any way to deny these children's equal right to an education. The Court (as stated at paragraph 20) found such exceptions to mean:

> . . . only that a parent may be excused from liability under the compulsory attendance provisions of the School Code when, with the approval of the local school board and the Secretary of Education and a finding by an approved clinic or public school psychologist or psychological examiner, the parent elects to withdraw the child from attendance. (Emphasis in original)

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[3] Compare: 24 Purd. Stat. Sec. 13-1330(2), which provides:

> Exceptions to compulsory attendance.
>
> The provisions of this action requiring regular attendance shall not apply to any child who: . . .
> (2) Has been examined by an approved mental clinic or by a person certified as a public school psychologist or psychological examiner, and has been found to be unable to profit from further public school attendance, and who has been reported to the board of school directors and excused, in accordance with regulations prescribed by the State Board of Education. (Emphasis supplied)

with D.C. Code §31-203, which provides:

> Mentally or physically unfit excused from attendance - Specialized instruction.
>
> The Board of Education of the District of Columbia may issue a certificate excusing from attendance at school a child who, upon examination ordered by such board, is found to be unable mentally or physically to profit from attendance at school: Provided, however, That if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall attend upon such instruction. (Emphasis supplied)

The Order also specified that the equal right to an education applies to any program of pre-school education. Under the terms of the Consent Agreement, wherever the public education or welfare authorities provide a pre-school program of education and training to children below the age of six, they shall also provide a program of education and training appropriate to the learning capacities of all retarded children of the same age.[4] (Para. 22)

C.

The Court required Defendants to cease and desist from denying access to education and training to those retarded persons under the care and supervision of the State's welfare authorities. It recognized that insofar as the Department of Public Welfare is charged to arrange for the care, training and supervision of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the capacities of that child. (Para. 37) However, the Court also ruled that the Pennsylvania educational authorities had the ultimate responsibility for assuring that every mentally retarded child is placed in some program of education and training. Furthermore, the Department of Education is required to supervise the programs of education and training in all institutions wholly or partly supported by the Department of Public Welfare, and the procedures to be adopted in such programs. [Para. 39(d)] Thus, the duty to provide proper education, in the last analysis, devolves upon these educational authorities whenever the needs of the retarded child are not being adequately served in any program administered by the Department of Public Welfare.[5] [Para. 40(b)]

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[4] In the District of Columbia, equal protection safeguards have clearly been found applicable to programs of kindergarten and pre-school education. Hobson v. Hansen, 269 F.Supp. 401, 496 (D. D.C. 1967).

D.

In the Pennsylvania decision, rules and regulations not in conformity to the Order of the Court were to be superseded or otherwise amended. In such instances, the Attorney General of the Commonwealth of Pennsylvania was ordered to issue an Opinion properly construing the offending state law, and the State Board of Education was ordered to issue regulations to implement said construction and supersede the existing regulations.[6] Thus, where a statute refers to the exclusion of beginners from the schools, the Attorney General must construe, and the Board must issue regulations construing such a statute, so as not to bar a retarded child from any education. Such regulations as are adopted to implement this construction can mean only that a school district may refuse to accept into or retain a retarded child in the lowest grade of the regular primary school. (Paras. 10 and 11)

E.

It was further ordered that no retarded child may be excluded from regular classes, suspended, reassigned, or otherwise subjected to a change of educational status without the right to notice and a due process hearing. Such rights to due process must be afforded to plaintiff children who are (1) denied access to a regular educational assignment at their point of entry in the system and to those (2) within the system who are assigned or reassigned on the basis of their alleged exceptional condition to regular education, to special education, to no assignment, or from one type of special education to another, including those services provided under tuition grant programs.[7/] For a child who is to be barred from admission to a regular educational assignment, the school authorities are under duties to:

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[5] See also Para. 50.

[6] See, e.g., Paras. 11 and 32. See also Paras. 27 and 40, which provide for new regulations implementing Court-approved policies.

> (a) provide for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971, before a child's admission as a beginner in the lowest grade of a regular primary school, or the lowest regular primary class above kindergarten, may be postponed; (b) require the automatic re-evaluation every two years of any educational assignment other than to a regular class, and (c) provide for an annual re-evaluation at the request of the child's parent or guardian, and (d) provide upon each such re-evaluation for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971. (Para. 12)

As set out in the Order of June 18, 1971, such prior hearings shall require written notice specifying a "clear and full statement" of the reasons for the proposed action, and advising the parent or guardian of (a) any alternative educational opportunities available other than that proposed, (b) the right to contest the proposed action at a full hearing at which the parent or guardian has the right to be represented by legal counsel, (c) the right to examine his child's school records before the hearing, (d) the right to present evidence of his own, and (e) the right to confront and to cross-examine any school official who may have evidence upon which the

---

[7/] See Para. 29.

proposed action may be based. A second notice must be forwarded before any failure to respond shall constitute a waiver of the opportunity for a hearing. The hearing to be accorded a child and his parents shall be held before a hearing officer who "shall not be an officer, employee, or agent" of any local school district in which the child resides. The hearing officer's decisions shall be based solely upon the evidence presented. In any such proceedings, the school district shall have the burden of proof. At such hearings, the parent or guardian shall, among other procedural guarantees, have the rights to counsel, access to records, production of witnesses, confrontation, and cross-examination.

F.

Finally, the Order provided for the appointment of masters to implement the mandated relief and to assure its extension to all entitled class members. Two masters were appointed specifically for the purpose of "overseeing a process of identification, evaluation, notification and compliance" as set forth in the Order.[8/] (Para. 45) In addition to approving plans to be submitted by Defendants, the masters are to hear any members of the plaintiff class who may be aggrieved in the implementation of the Order.[9/] (Para. 51) Jurisdiction was retained by the Court until after it hears the final report of the masters. (Para. 53)

[8/] See Paras. 46, 47, 48, 49 and 50, which pertain to the timetable for implementation of the Court's Orders.

[9/] See Paras. 33 and 39, which provide for certain minimal standards for the education provided to homebound and institutionalized children.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement to Memorandum in Support of Verified Complaint was mailed, postage prepaid, to Jeffrey L. Fornaciari, Esquire, Attorney for Defendant Charles I. Cassell, Urban Law Institute, 1145 19th Street, N.W., Suite 509, Washington, D.C. 20036, and to Stephen Shane Stark, Esquire, Attorney for Defendants Except Charles I. Cassell, District Building, Washington, D.C. 20004, this 3rd day of November, 1971.

Stanley Herr

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1.e.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER MILLS, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 1939-71
)
BOARD OF EDUCATION OF)
THE DISTRICT OF COLUMBIA,)
et al.,)
)
Defendants.)

STIPULATION AND ORDER

Upon consent and stipulation of the parties, it is hereby ORDERED that:

1. Defendants shall provide plaintiffs Peter Duane Steven and Michael with a publicly-supported education suited to their (plaintiffs') needs by January 3, 1972.

2. Defendants shall provide counsel for plaintiffs, by January 3, 1972, a list showing, for every child of school age then known not to be attending a publicly-supported educational program because of suspension, expulsion, exclusion, or any other denial of placement, the name of the child's parent or guardian, the child's name, age, address and telephone number, the date of his suspension, expulsion, exclusion or denial of placement and, without attributing a particular characteristic to any specific child, a breakdown of such list, showing the alleged casual characteristics for such non-attendance and the number of children possessing such alleged characteristics.

3. By January 3, 1972, Defendants shall initiate efforts to identify remaining members of the class not presently known to them and, also by that date, shall notify counsel for

plaintiffs of the nature and extent of such efforts. Such efforts shall include, at a minimum, a system-wide survey of elementary and secondary schools, use of the mass written and electronic media, and a survey of District of Columbia agencies who may have knowledge pertaining to such remaining members of the class. By February 1, 1972, Defendants shall provide counsel for plaintiffs with the names, addresses and telephone numbers of such remaining members of the class then known to them.

4. Pending further action by the Court herein, the parties shall consider the selection and compensation of a master for determination of special questions arising out of this action with regard to the placement of children in a publicly-supported educational program suited to their needs.

5. This interim Order may be amended or supplemented by agreement of the parties with the approval of the Court, and a further pre-trial conference shall be held with the Court at 4 P.M. on Friday, January 7, 1972, for considerations of such amendments or supplements.

Stipulated and agreed upon by all parties this 20th day of December, 1971.

/s/
Stephen Shane Stark
Counsel for Defendants

Julian Tepper
Stanley Herr
Patricia M. Wald
Paul Dimond

Counsel for Plaintiffs

/s/
Jeffrey Fornaciari
Counsel for Defendant
Charles I. Cassell

ORDER

The foregoing stipulation by the parties, having been considered by the Court, is hereby approved and the parties are ORDERED and DIRECTED to comply with the terms and conditions thereof.

/s/

Joseph Waddy
United States District Judge

12/20/1971

Date

Exclusion: State Law

I. B.

1.

WOLF V. LEGISLATURE OF THE STATE OF UTAH

Civil Nc. 182646, filed 1-8-69
Third District Court, Salt Lake
County, Utah

OPINION AND JUDGMENT

Attorneys for Plaintiffs:
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Telephone 364-7727

This matter came regularly on for hearing before the above-entitled court on December 30, 1968; argument being presented by Bruce G. Cohne and Don W. Klingle of Summerhays, Klingle & Cohne, Attorneys for the Plaintiffs, and by Mel Dayley, Assistant Attorney General, representing the Attorney General of the State of Utah and the defendants; the Court heretofore having entered its Findings of Fact and Conclusions of Law; NOW, THEREFORE, the Court does hereby enter the following written opinion and judgment:

Education, today, is probably the most important function of state and local governments. It is a fundamental and inalienable right and must be so if the rights guaranteed to an individual under Utah's Constitution and the United States Constitution are to have any real meaning. Of what value would be the right to assemble, the right to speak the right to participate in one's own religion, if an individual were to be denied an education. Education enables the individual to exercise these rights guaranteed him by the Constitution of the State of Utah and the Constitution of the United States of America.

Utah has historically placed a premium value on education. The Supreme Court of the State of Utah re-emphasized this when it said in Logan City School Dist. v. Kowallis, 94 Utah 342, 349,77 P.2d. 348, 353 (1923).

> "The history of educational development in Utah, from the first settlements to the very latest enactments, shows a devotion to the ideal of intellectual development and constantly a growing effort to insure all children in the state equality of educational opportunities and privileges as a fundamental and inalienable right, free and open to all alike
> (Emphasis added.)

Our Supreme Court in 1938, when the Logan City case (supra) was decided, was well aware of the vital importance of a free education. Today, 30 years later, the right to education and the need for education is no less fundamental and vital. Today it is doubtful that any child may reasonably be expected to succeed in life if he is denied the right and opportunity of an education. In the instant case the segregation of the plaintiff children from the public school system has a detrimental effect upon the children as well as their parents. The impact is greater when it has the apparent sanction of the law for the policy of placing these children under the Department of Welfare and segregating them from the educational system can be and probably is usually interpreted as denoting their inferiority, unusualness, uselessness and incompetency. A sense of inferiority and not belonging affects the motivation of a child to learn. Segregation, even though perhaps well intentioned, under the apparent sanction of law and state authority has a tendency to retard the educational, emotional and mental development of the children. The setting aside of these children in a special class affects the plaintiff parents in that under apparent sanction of law and state authority they have been told that their children are not the same as other children of the State of Utah and therefore are not to be treated like all other children of the State of Utah which, to say the least, cannot have a beneficial effect upon the parents of these plaintiff children.

The founding fathers of our state and the authors of the Utah Constitution clearly were aware of the importance of providing a free education to all children of the State of Utah. In Article X, Section 1, of the Utah Constitution it is provided that:

> "The Legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the state, and be free from sectarian control. (Emphasis added.)

The Founding fathers and authors of the Utah Constitution were also aware that the education of children should be the primary responsibility of an educational authority for they provided in Article X, Section S, of the Utah Constitution.

> "The general control and supervision of the public school system shall be vested in a State Board of Education,...."

The legislatures and the legislators who followed the enactment of the Utah Constitution repeatedly re-affirmed the founding fathers' and authors' of the Utah Constitution belief in a free and equal education for all children administered under the Department of Education by enacting statutory laws that continually emphasized the public policy of the State of Utah to be the providing of a free education to all children of the State of Utah. An example of the re-affirmation of the legislators and the legislatures of the State of Utah since the enactment of the Utah Constitution is provided by Utah Code Annotated, Section 53-4-7 (Supp.1967), wherein it provides

> "In each school district public schools shall be free to all children between the ages of six and eighteen years who are residents of said district except that such schools shall also be free to persons who have not completed high school up to and including the age of twenty-one years."

It is thus abundantly clear that the plaintiff children must be provided a free and equal education within the school districts of which they are residents, and the state agency which is solely responsible for providing the plaintiff children with a free and equal education is the State Board of Education.

WHEREFORE, the Court enters the following judgment:

1. Under the Constitution and the laws of the State of Utah the plaintiff children and the plaintiffs' children are entitled to a free education within the framework of the public school system of the State of Utah.

2. The State Board of Education under the Constitution and the laws of the State of Utah has the primary duty and responsibility to see that the plaintiffs' children and the plaintiff children receive a free education within the framework of the public school system of the State of Utah.

Dated this 8 day of January, 1969.

Judge D. Frank Wilkins

III.B.

WOLF V. LEGISLATURE OF THE STATE OF UTAH

Civil No. 182646, filed 1-8-69
Third District Court, Salt Lake
County, Utah

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came regularly on for hearing before the above-entitled court, the Honorable D. Frank Wilkins presiding, on the 30th day of December, 1968, the plaintiffs being represented by and through their counsel of record, Bruce G. Cohne and Don W. Klingle of the law firm of Summerhays, Klingle & Cohne, and the defendants being represented by the Attorney General of the State of Utah by and through Mel Dayley, duly authorized and appointed Assistant Attorney General of the State of Utah. Formal argument was heard by the court, and after being fully advised in the premises, the court granted the plaintiffs' motion for summary judgment and now, being fully advised in the premises, does enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff parents, Mr. and Mrs. Willard   and Mr. and Mrs. Fred   , and plaintiff children, Richard   and Joan Annette   , are residents of the State of Utah. Plaintiff children, ages 18 and 12 respectively, are mentally retarded, having I.Q.'s in a range defining them as trainable, and have been denied admission to the regularly constituted common school system of the State of Utah. Plaintiff children are currently enrolled at day care centers, for which fees are paid by the respective plaintiff parents.

CONCLUSIONS OF LAW

1. The Utah Constitution, Article X, Section 1, provides:

> "The Legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State, and be free from sectarian control." (Emphasis added.)

There are no reported cases construing this provision with regard to whether it requires the State to provide education to retarded children. The Utah Supreme Court has, however, interpreted this provision in a very broad manner. In Logan City School Dist. v. Kowallis, 94 Utah 342, 347, 77 p. 2d 348, 350 (1933), the court stated:

> "The requirement that the schools must be open to all children of the state is a prohibition against any law or rule which would separate or divide the children of the state into classes or groups, and grant, allow, or provide one group or class educational privileges or advantages denied another. No child of school age, resident within the state, can be lawfully denied admission to the schools of the state because of race, color, location, religion, politics, or any other bar or barrier which may be set up which would deny to such child equality of educational opportunities or facilities with all other children of the state. This is a direction to the Legislature to provide a system of public schools to which all children of the state may be admitted.

Thus, it would seem clear that the public schools must be open to all children, including the plaintiff children.

2. It is the public policy of this state that the financial burden of providing public education should be borne by the taxpayers of the state and not by the parents or children involved. Utah Code Annotated, Section 53-4-7 (Supp. 1967) provides

> In each school district the public schools shall be free to all children between the ages of six and eighteen years who are residents of said district except that such schools shall also be free to persons who have not completed high school up to and including the age of twenty-one years.

It is thus abundantly clear that plaintiff children must be provided free public education within the school districts of which they are residents.

3. The Utah Constitution, Article X, Section 8, provides

> The general control and supervision of the public school system shall be vested in a State Board of Education....

The State Board of Education, therefore, is the state agency which is solely responsible for providing the plaintiff children with the public education to which they are entitled.

Dated this day of January, 1969.

Judge D. Frank Wilkins

III.C.

UTAH LAWS: 1969 LAWS, CH. 136

EDUCATION OF THE HANDICAPPED

H. B. No. 105

(New language only -- Old language that was bracketed has been deleted and new language included without the underlining)

AN ACT AMENDING SECTIONS 53-18-1 AND 53-18-2, UTAH CODE ANNOTATED 1953, AS AMENDED BY CHAPTER 83, LAWS OF UTAH 1959, AND AMENDING SECTIONS 53-18-3 AND 53-18-4, UTAH CODE ANNOTATED 1953, RELATING TO SPECIAL EDUCATION FOR THE HANDICAPPED; PROVIDING FOR A BROADENED PROGRAM BY THE PUBLIC SHCOOLS, TRAINING REQUIREMENTS OF INSTRUCTIONAL PERSONNEL FOR THE HANDICAPPED; AND REPEALING AND REENACTING SECTIONS 53-18-5, 53-18-6, 53-18-7, AND 53-18-8, UTAH CODE ANNOTATED 1953, AS ENACTED BY CHAPTER 96, LAWS OF UTAH 1959; PROVIDING FOR THE TRANSFER OF THE DAY CARE CENTERS FOR THE HANDICAPPED AS ESTABLISHED BY THE DIVISION OF WELFARE, THE ESTABLISHMENT OF TRAINING CENTERS FOR THE HANDICAPPED BY LOCAL SCHOOL DISTRICTS, THE TRANSFER OF REAL PROPERTY, EQUIPMENT, AND SUPPLIES TO LOCAL DISTRICTS; ESTABLISHING AN EVALUATION PROCESS REQUIRED FOR THE EXEMPTION OF HANDICAPPED CHILDREN FROM SCHOOL PROGRAMS, DIAGNOSTIC SERVICES BY THE STATE DIVISION OF HEALTH; AND ESTABLISHING AN ADVISORY COMMITTEE FOR THE HANDICAPPED; AND REPEALING SECTIONS 53-18-9 AND 53-18-10, UTAH CODE ANNOTATED 1953, AS ENACTED BY CHAPTER 96, LAWS OF UTAH 1959; AND ESTABLISHING AN EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Utah:

H. B. No. 105

Section 1. Section 53-18-1, Utah Code Annotated 1953, as amended by Chapter 83, Laws of Utah 1959, is amended to read as follows:
53-18-1. It shall be the duty of the clerk of the board of education, school enumerators, and attendance officers in every school district in this state, in accordance with rules of procedures prescribed by the state superintendent of public instruction, to secure information and report to the state superintendent of public instruction, on or before the fifteenth day of November of each year, and thereafter, as cases arise, every handicapped child within said district of pre-school age, school age, and post-school age; who, because of apparent exceptional physical or mental condition, is not being properly educated and trained; and, as soon thereafter as possible, the child shall be examined by a person certified by the district superintendent or the state board of education as a public school psychologist or psychological examiner, and a report shall be made to the state superintendent

of public instruction concerning said child's special educational and training needs. These children and all persons presently being educated and trained in existing day care centers for the handicapped are referred to as handicapped children.

Section 2. Section 53-18-2, Utah Code Annotated 1953, as amended by Chapter 83, Laws of Utah 1959, is amended to read as follows:

53-18-2. The state board of education shall provide proper education and training for all handicapped children in this state, except as provided in Section 53-18-6 as reenacted by this act.

The state board of education shall appoint a director of special education of handicapped children for the state of Utah. The state director of special education shall submit plans to the state board of education for establishing and maintaining supervision for the proper education and training of all handicapped children reported to the director for such special education and training; and except as herein otherwise provided, it shall be the duty of the board of education of all school districts, to provide and maintain from the funds of said school district, or to provide jointly and maintain with neighboring districts from the funds of each of the school districts so participating in proportionate amounts, and appropriate program of special instruction, facilities and related services for all handicapped children. The state board of education shall adopt standards and regulations relating to the diagnosis and evaluation of the handicapped children by competent professional personnel, special instruction classes and services to be provided and other appropriate guidelines which shall be followed by the local school districts. If it is not possible to provide special education for handicapped children in the public schools in the district, or in conjunction with another school district, the board of education of the district shall, except as herein otherwise provided, secure such education and training outside of the public schools of the district or provide for teaching the handicapped children in their homes in accordance with rules and regulations prescribed by the state board of education. All personnel employed to teach such children shall be either certified teachers or shall have met existing qualifications as determined for aides and instructional assistance, established by the state board of education. Personnel qualified by the division of welfare for instruction and training in day care centers for the handicapped shall be given five years from the effective date of this act within which to qualify under standards and regulations established by the state board of education.

The state director of special education shall be a specially qualified and experienced director responsible for coordinating all state programs for all handicapped children of preschool or school ages to facilitate the educational progress of such children. The director shall exercise general supervision of all programs for the handicapped children of the various school districts of the state and all public agencies and institutions concerned with the training of handicapped children. The director shall encourage and assist in organizing programs for handicapped children which shall be under the immediate administration of district boards of education or of existing state educational institutions which have been authorized for this purpose. The director of special education shall work in cooperation with private agencies concerned with the training of handicapped children.

Section 3. Section 53-18-3, Utah Code Annotated 1953, is amended to read as follows:
53-18-3. School districts maintaining special classes in the public schools, or special public schools, or providing special education for handicapped children as herein specified, shall receive reimbursement from the state board of education, so long as such classes, or such special education is approved by the state board of education as to location, constitution and size of classes, conditions of admission and discharge of pupils, equipment, courses of study, methods of instruction and qualifications of personnel, and in accordance with other regulations and standards promulgated by the state board of education from time to time. The cost of such education and training of handicapped children below age five and above age twenty-one shall be paid from fees and contributions of parents or guardians or friends of the handicapped children served. To further the purposes of this program school districts may receive contributions of money, property and services. There is hereby appropriated from the uniform school fund not to exceed 80 distribution units for fiscal year 1970 and an additional growth factor of not more than 5% each fiscal year thereafter for support of programs for the education and training of handicapped children, qualifying for service in day care centers for the handicapped. These programs will be administered by the state board of education.

Section 4. Section 53-18-4, Utah Code Annotated 1953, is amended to read as follows:
53-18-4. The state superintendent of public instruction shall superintend the organization of such special programs and schools, and such other arrangements for special education, and shall enforce the provisions of this act.

Section 5. Section 53-18-5, Utah Code Annotated 1953, as enacted by Chapter 96, Laws of Utah 1959, is repealed and reenacted to read as follows:
53-18-5. All property, equipment, and supplies, identifiable as having been purchased by public funds administered through the division of welfare and located in existing day care centers for the handicapped, shall become the property of the school district in which the centers are located upon the effective date of this act and the local school board shall be responsible for all such property, equipment and supplies.

Section 6. Section 53-18-6, Utah Code Annotated 1953, as enacted by Chapter 96, Laws of Utah 1959, is repealed and reenacted to read as follows:
53-18-6. Handicapped children who hold valid certificates of exemption which have been issued by the local district superintendent shall be exempt from attending any school. A certificate of exemption shall cease to be valid at the end of the school year in which it is issued. Certificates

of exemption must result from an evaluation process conducted by an evaluation team established for that purpose by the district board of education. A certificate of exemption may be issued to a handicapped child only if the evaluation team determines that he is unstable to the extent he constitutes a potential hazard to the safety of himself or to others. A majority of the members of the evaluation team must not be employees of the school district. The evaluation team shall include at least three persons and shall include a division of health evaluation service representative, a qualified person designated by the local district superintendent, and a third qualified person skilled in the area of the handicap of the child being evaluated. The certificate of exemption is subject to review by a three man panel appointed for that purpose by the state director of special education upon the filing of written protest by the parent or guardian within thirty days after the exemption certificate is issued.

Section 7. Section 53-18-7, Utah Code Annotated 1953, as enacted by Chapter 96, Laws of Utah 1959, is repealed and reenacted to read as follows:

53-18-7. The state division of health shall provide diagnostic and evaluation services such as typically are not otherwise provided by local school districts, to determine the most appropriate methods in assisting handicapped children and in preparing them for adequate placement and adjustment.

Section 8. Section 53-18-8, Utah Code Annotated 1953, as enacted by Chapter 96, Laws of Utah 1959, is repealed and reenacted to read as follows:

53-18-8. There is established an advisory committee for the handicapped children consisting of one representative each from the state board of education, the state division of health, the state division of welfare, a state institution of higher learning for teacher training, a state senator, a state representative, and three citizens who are members of a national or state association interested in handicapped children; all members to be appointed by the governor. The committee shall study the needs of and recommend programs for handicapped children to the state board of education, the state division of health and the state division of welfare.

Section 9. Sections 53-18-9 and 53-18-10, Utah Code Annotated 1953, as enacted by Chapter 96, Laws of Utah 1959, are repealed.

Section 10. The effective date of this act shall be July 1, 1969.

Exclusion: State Law

2. a.

DOE v. BOARD OF SCHOOL DIRECTORS
MILWAUKEE, WISCONSIN

STATE OF WISCONSIN : CIRCUIT COURT, CIVIL DIVISION : MILWAUKEE COUNTY

TEMPORARY INJUNCTION

The motion for Temporary Injunction, coming on to be heard upon the order to show cause herein, at the time and place specified.

Upon presentation and consideration of the verified complaint of the plaintiffs in support of the motion, and after hearing testimony in support of and in opposition to the motion, and after hearing John Scripp, Esq., attorney for the plaintiffs and Richard D. Cudahy, Esq., guardian ad litem for plaintiff JOHN DOE and Peter Stupar, attorney for defendants, in opposition to the motion, and being advised in the premises,

IT IS ORDERED, that the BOARD OF SCHOOL DIRECTORS of the City of Milwaukee, E. DONALD BLODGETT, Executive Director of the Department of Special Education for Milwaukee Public Schools, and DOMINIC BERTUCCI, Supervisor of Special Education, defendants herein, accept the plaintiff JOHN DOE into Milwaukee Public School class for the trainable mentally retarded with all reasonable speed; such action to be accomplished, in any event, within fifteen (15) days of the entry of this order.

Until further order of this Court.

Dated at Milwaukee, Wisconsin, in Milwaukee County this 13th day of April 1970.

Judge of the Circuit Court

2.b.

DOE v. BOARD OF SCHOOL DIRECTORS
MILWAUKEE, WISCONSIN

STATE OF WISCONSIN : CIRCUIT COURT, CIVIL DIVISION : MILWAUKEE COUNTY

COMPLAINT

1.

Plaintiff, is a 14 year old minor child residing with his widowed mother in the State of Wisconsin, City and County of Milwaukee.

2.

The above plaintiff brings this action on his own behalf, and, pursuant to Section 260.12, Wisconsin Statutes, on behalf of all other mentally retarded minors residing within the City of Milwaukee who have sought enrollment in the Public Schools in the City of Milwaukee, who have not been enrolled in classes for the trainable mentally retarded in such schools, but who instead have been placed on a waiting list for such classes under the policies and practices of the BOARD OF SCHOOL DIRECTORS of the City of Milwaukee, school officials and administrators; said persons have a common interest in the questions herein and are so very numerous that it would be impractical to bring them all before the Court.

3.

Defendant, BOARD OF SCHOOL DIRECTORS, City of Milwaukee, which has its main offices at 5225 West Vliet Street in the City and County of Milwaukee, Wisconsin, is the school board in charge of the public schools in the City of Milwaukee, pursuant to Chapter 119, Wisconsin Statutes, including classes for mentally retarded children, pursuant to Section 115.80, Wisconsin Statutes.

4.

Defendant, E. DONALD BLODGETT, is Executive Director of the Department of Special Education for Milwaukee Public Schools, with his office at 5225 West Vliet Street, Milwaukee, Wisconsin, and as such is generally responsible for the operations of all programs for the mentally handicapped in the Milwaukee Public Schools.

5.

Defendant, DOMINIC BERTUCCI, is the Supervisor of Special Education for Milwaukee Public Schools with his office at 5225 West Vliet Street, Milwaukee, Wisconsin, and as such, upon information and belief, is responsible for placing the named plaintiff and other children in his class on a waiting list instead of placing them in special education classes.

6.

In March of 1969, the plaintiff's mother, had the plaintiff examined by a psychologist from the Department of Psychological Services of the Milwaukee Public Schools as a prerequisite for enrollment in a special education class.

7.

Upon information and belief, on May 6, 1969, a report of the results of that examination along with a recommendation that the plaintiff be placed in a special education program in the Milwaukee Public Schools was forwarded to the Department of Special Education of the Milwaukee Public Schools.

8.

At some time subsequent, upon information and belief, the Department of Special Education, under the direction and control of defendants BLODGETT and BERTUCCI, placed the plaintiff on a waiting list for admission to a Milwaukee Public School classroom for trainable mentally retarded children.

9.

In February, 1970, inquiries were made of the Department of Special Education on plaintiff's behalf as to whether and when plaintiff would be enrolled in a class for mentally retarded children in the Milwaukee Public Schools.

10.

Upon information and belief, defendants and their representatives answered that there was no present prospect for plaintiff's enrollment.

11.

Plaintiff, has been and is now being denied his rights to a public education solely because of defendants' policy and practice which places children, who are otherwise presently qualified for enrollment in a Milwaukee Public School class for the trainable mentally retarded, on a waiting list for such classes.

12.

By denying plaintiff present enrollment in a class for trainable mentally retarded children, defendants have deprived him of his right to attend public school, a right guaranteed him by Article X, Section 3, of the Wisconsin Constitution.

13.

By denying plaintiff present enrollment in a class for trainable mentally retarded children, defendants have deprived plaintiff of his right to attend school in violation of Sections 119.09(4) and 119.07(1), of the Wisconsin Statutes.

14.

By denying plaintiff present enrollment in a class for trainable mentally retarded children, defendants have invidiously discriminated against and arbitrarily deprived the plaintiff of his right to a public school education in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

15.

Plaintiff has suffered and will continue to suffer serious and irreparable harm from defendants' denial of his right to enrollment in school.

16.

Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff repsectfully requests that this Honorable Court:

1.

Enter a temporary restraining order, requiring that defendants immediately enroll the plaintiff in a class for trainable mentally retarded children pending further determination by this Court.

2.

Enter a temporary and permanent injunction to:

a. Require defendants to enroll plaintiff in a class for trainable mentally retarded children; and,

b. enjoin defendants from using the device of a waiting list to deny a public education to children who are presently qualified for enrollment in classes for the trainable mentally retarded.

3.

Render a declaratory judgment, pursuant to Section 269.56, Wisconsin Statutes, declaring that the policy and practice of denying a public education to children presently qualified for enrollment in classes for the trainable mentally retarded by placing those children on a waiting list for such classes:

a. Violates Article X, Section 3 of the Wisconsin Constitution;

b. Violates Sections 119.09(4) and 119.07(1) of the Wisconsin Statutes; and

c. Creates an arbitrary and invidious classification denying plaintiff children equal protection of the law as secured by the Fourteenth Amendment of the United States Constitution.

4.

Grant any further, additional or alternative relief as may appear to the Court to be equitable, just and proper.

5.

Allow plaintiff his costs and disbursements herein.

Respectifully submitted,

John Scripp
Attorney for Plaintiff

2.C.

DOE v. BOARD OF SCHOOL DIRECTORS
MILWAUKEE, WISCONSIN

STATE OF WISCONSIN : CIRCUIT COURT, CIVIL DIVISION : MILWAUKEE COUNTY

PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM AND ATTORNEY

TO: CIRCUIT COURT
CIVIL DIVISION
MILWAUKEE, WISCONSIN

The petition of KAHLA respectfully represents:

1. That she is the widowed mother of the JOHN referred to in the above-caption.

2. That her son is a minor, fourteen years old, mentally retarded, living in Milwaukee, Wisconsin;

3. That it is her desire, on his behalf, to institute an action in this Court against the BOARD OF SCHOOL DIRECTORS, City of Milwaukee, E. DONALD BLODGETT, DOMINIC BERTUCCI for injunctive and declaratory relief to compel his admission to a class for trainable mentally retarded children in the Milwaukee Public Schools.

WHEREFORE, she prays on her son's behalf, that JOHN SCRIPP may be appointed as guardian ad litem for the purpose of instituting the action, he having consented to it.

Dated at Milwaukee, Wisconsin, this 6th day of April, 1970.

Kahla , Petitioner

DOE v. BOARD OF SCHOOL DIRECTORS
MILWAUKEE, WISCONSIN

STATE OF WISCONSIN : CIRCUIT COURT, CIVIL DIVISION : MILWAUKEE COUNTY

CONSENT

I, RICHARD CUDAHY, in the above petition named, consent and am willing to serve as the guardian ad litem of the above-named petitioner, for the purpose of instituting action against BOARD OF SCHOOL DIRECTORS, CITY OF MILWAUKEE, E. DONALD BLODGETT, and DOMINIC BERTUCCI.

Dated at Milwaukee, Wisconsin this 8th day of April, 1970.

Richard Cudahy

Now on this day, the petition of KAHLA , mother of the above-named, for the appointment of ____________________ as her son's guardian ad litem for the purpose of instituting suit against BOARD OF SCHOOL DIRECTORS, CITY OF MILWAUKEE, E. DONALD BLODGETT and DOMINIC BERTUCCI, and the written consent of ____________________ being presented to the Court and approved, RICHARD CUDAHY is hereby appointed as guardian ad litem to institute and prosecute the action.

Dated at Milwaukee, Wisconsin this 8 day of April, A.D., 1970.

Circuit Judge

DOE v. BOARD OF SCHOOL DIRECTORS
MILWAUKEE, WISCONSIN

STATE OF WISCONSIN : CIRCUIT COURT, CIVIL DIVISION : MILWAUKEE COUNTY

ORDER TO PROCEED BY FICTITIOUS NAME

Upon the basis of the grounds stated in the Motion attached hereto, and upon hearing the motion of the plaintiff for an order permitting him to proceed in this action by a fictitious name,

IT IS ORDERED that:

1.

is permitted to proceed in this action under the fictitious name, and

2.

All records, files and documents in the above-mentioned action shall not be open to anyone except the defendants and their attorneys for inspection or their contents disclosed except with permission or by order of this Court.

Dated at Milwaukee, Wisconsin, this 8 day of April, 1970.

BY THE COURT:

Circuit Court Judge

DOE v. BOARD OF SCHOOL DIRECTORS
MILWAUKEE, WISCONSIN

STATE OF WISCONSIN : CIRCUIT COURT, CIVIL DIVISION : MILWAUKEE COUNTY

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

I. PRELIMINARY STATEMENT

The plaintiff, is a fourteen year old mentally retarded boy who has sought, and now seeks, admission to a class for the trainable mentally retarded children operated by defendants.* Defendants have not admitted him, but instead have placed him on a waiting list for such classes. Plaintiff seeks orders of this Court enjoining defendants from continuing to keep any mentally retarded child on a waiting list for an education in a class for the trainable mentally retarded, and declaring that defendants' practice of placing children on such a list rather than providing them with an education, deprives said children of their right to an education under Article X, Section 3, Wisconsin Constitution; violates Sections 119.09(4) and 119.07(1), Wisconsin Statutes; and invidiously discriminates against them in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

II. SUMMARY OF ARGUMENT

The legal authorities which plaintiff will summarize in this memorandum demonstrate that plaintiff has a substantial likelihood of success on the merits. The facts of this case, as stated in plaintiff's affidavit, show a substantial irreparable injury warranting temporary injunctive relief.

A. ARTICLE X, SECTION 3, OF THE WISCONSIN CONSTITUTION PROVIDES THAT SCHOOLS SHALL BE OPEN TO ALL WISCONSIN CHILDREN BETWEEN THE AGES OF FOUR AND TWENTY YEARS.

Article X, Section 3, of the Wisconsin Constitution provides, in pertinent part:

> "Section 3. The legislature shall provide by law for the establishment of district schools, which

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* Milwaukee Public Schools operate a number of classes for mentally retarded children. Upon information and belief, children whose retardation is only mild attend "Special C" classes. Children whose retardation may be moderate to severe attend "trainable mentally retarded" classes.

> shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to *all children* between the ages of four and twenty years . . . ." (Emphasis added)

This provision unambiguously mandates school districts in Wisconsin to provide free education for all children therein between the prescribed ages. See *City of Manitowoc v. Town of Manitowoc Rapids*, 231 Wis. 94, 285 N.W. 403, 404-405 (1939). Under it, plaintiff has a constitutionally protected *present* right to a public education.

B. SECTIONS 119.07(1) and 119.09(4), WISCONSIN STATUTES, REQUIRE THE MILWAUKEE BOARD OF SCHOOL DIRECTORS TO ESTABLISH AND MAINTAIN SCHOOLS SUFFICIENT TO ACCOMODATE ALL MENTALLY RETARDED MILWAUKEE CHILDREN OF SCHOOL AGES WHO DESIRE TO ATTEND SCHOOL.

Section 119.07(1), Wisconsin Statutes, provides:

> "(1) The Board (Milwaukee Board of School Directors) *shall* establish and organize so many public schools, in addition to those already established in such city, as may be necessary for the accommodation of the children of the city entitled by the constitution and laws of the state to instruction therein." (Emphasis added)

Section 119.09(4), Wisconsin Statutes, provides, in pertinent part:

> "(4) The board (Milwaukee Board of School Directors) *shall* establish and maintain such special schools for the deaf, blind, crippled and for the mentally or physically disabled *as may be required to accommodate pupils of school age desiring to attend school*. . . ." (Emphasis added)

The language of the above provisions of the Milwaukee School Laws is as unmistakably clear as it is mandatory. Article X, Section 3 constitutionally entitles the plaintiff, a mentally retarded child, to an education. Section 119.09(4) gives all mentally retarded Milwaukee children of school age who desire to attend school a right to a public school education under Wisconsin Statutes. That Section and Section 119.07(1) each unequivocally mandate the defendant Milwaukee Board of School Directors to establish and maintain schools sufficient to satisfy those rights and defendant Board's correlative obligations.

C. DEFENDANT'S POLICY AND PRACTICE OF PLACING MENTALLY RETARDED CHILDREN ON A WAITING LIST FOR A PUBLIC EDUCATION DENIES PLAINTIFF AND OTHER SUCH CHILDREN EQUAL PROTECTION OF LAW IN VIOLATION OF THE UNITED STATES CONSTITUTION.

As stated in the accompanying affidavit, Plaintiff sought admission to a Milwaukee Public School in March, 1969. At that time Public School Psychologists tested him and recommended that he be enrolled in a Public School class for trainable mentally retarded children. Defendants have denied plaintiff enrollment by placing him on a waiting list.

The equal protection clause of the Fourteenth Amendment to the United States Constitution requires at the very minimum that laws be applied equally among persons of a defined class. McLaughlin v. Florida. 379 U.S. 184; Gulf C. & S.F.R. Co. v. Ellis, 165 U.S. 150, 155.

In the instant case, the denial of equal protection is two-fold. First, plaintiff is a child of school age living in the City of Milwaukee. Article X, Section 3 of the Wisconsin Constitution guarantees a right of education to "all children between the ages of four and twenty years." Upon information and belief, defendants have admitted and do admit the great bulk of Milwaukee children between those ages to Milwaukee Public Schools without requiring them to spend varying and indefinite amounts of time on waiting lists waiting for an education. Defendants, however, have not admitted plaintiff to a public school, but have instead placed him on a waiting list without an education. Clearly, defendants are not applying the law, Article X, Section 3 of the Wisconsin Constitution, equally among all children between the ages of four and twenty and are denying plaintiff equal protection of the law.

The second violation of equal protection in this case concerns the denial of plaintiff's right to an education under Section 119.09(4), Wisconsin Statutes. That law requires defendant Board of School Directors to establish schools sufficient to accommodate children of school age with various listed handicaps, including children with mental disabilities. Pursuant to that obligation, defendants have provided classes for trainable mentally retarded children. Upon information and belief, approximately four hundred Milwaukee school age children presently attend such classes. Defendants, however, have prohibited plaintiff from receiving the same present education by placing him on a waiting list for such classes, again denying him equal protection of the law.

Defendants have not indicated a basis or justification for this unequal application of laws among children of the same class. Defendants might attempt to classify plaintiff and those he represents as being somehow different from, and not entitled to, educational opportunities guaranteed other Wisconsin school age children and other mentally handicapped Milwaukee children. This Court must closely scrutinize any such offered classification to determine if it too is arbitrary and invidious and violative of the Equal Protection Clause.

> "(W)here rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."
> Harper v. Virginia Board of Elections, 383 U.S. 633, 670. Levy v. Louisiana, 391 U.S. 68.

To be valid in this case, such a classification must bear more than a mere reasonable relation to the ends sought to be achieved by the constitutional and statutory provisions here asserted. Rather, unless defendants can show that the classification utilized to deprive plaintiff of his rights to an education promotes a "compelling governmental interest", that classification must be declared an invidious discrimination violative of Equal Protection. Shapiro v. Thompson, 394 U.S. 618, 635; Levy v. Louisiana, 391 U.S. 68.

Exclusion:
Race Discrimination

I. D.

UNITED STATES DISTRICT COURT

IN THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

PEGGY GIVENS, et al, plaintiffs,	PLAINTIFFS'
vs.	ADDENDUM TO TRIAL BRIEF
WILLIAM E. POE, et al, defendants.	CIVIL ACTION NO. 2615

Plaintiff wishes to call attention to the following cases which are precedential in this case and which came to the attention of his attorney after the completion of the trial brief:

Kelley v. Metropolitan County Board of Education of Nashville, 293 F. Supp. 485 (M.D. Tenn. 1968) found the suspension of all interscholastic athletics for black high schools for a year to be a substantial deprivation of a state benefit, requiring a due process hearing. What affects students adversely cannot be done without due process, 293 F. Supp. at 491.

Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D. Texas 1969), a case involving two high school students expelled for publishing a newspaper, found the two to be proper representatives of the class subject to the system's regulations. Further, expunging the record as requested relief kept the issue from being moot (citing Carfus v. La Vallee, 391 U.S. 234 (1968) as did the class action aspects.

On procedure, the case found unfairness in the principal's deciding on his course of action, and then speaking to the parents merely to notify them of his decisions. The proper protections were (a) formal written notice of charges and evidence to parent and student, (b) formal hearing, both sides presenting their case, and (c) substantial evidence supporting a decision.

Lastly, Black Students of North Fort Myers Jr.-Sr. High School ex rel. Shoemaker v. Williams, 317 F. Supp. 1211 (M.D.Fla. 1970) was also a class action, the class being 80 suspended students. Note that the punishment sought to be levied on the students was a ten day suspension. The students had walked out of school, violating a school rule and triggering an automatic suspension rule. The Board met on their case, but did not sit as a tribunal, remarkably parallel to recent Charlotte disturbance procedures. The Court cited Dixon, and required a prior due process hearing with the same requirements as Sullivan before suspension for ten days.

These cases reinforce the point that public school due process is not a new concept and point in the direction of proper relief.

Respectfully submitted,

November 21, 1971

Shelley Blum, attorney for plaintiff

I certify that I have delivered a copy of this Addendum to Plaintiffs' Trial Brief to Richard Bigger, Jr. by personally handing him a copy.

November __, 1971

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

PEGGY GIVENS, et al,)
Plaintiffs,)
)
vs.)
)
WILLIAM E. POE, et al,)
Defendants.)

Civil Action No. 2615
PLAINTIFFS'
TRIAL BRIEF

Plaintiffs respectfully submit the following Trial Brief in hopes that the discussion of the following issues will be of use to the Court.

Brief Statement of the Case . . . . page 1
Juveniles Rights . . . . page 1
Due Process . . . . page 2
Equal Protection . . . . page 5
Due Process Before Suspension . . . . page 9
Character of a Due Process Hearing . . . . page 14
Relief . . . . page 17

Brief Statement of the Case

This case was filed on January 27, 1970 after plaintiffs, two sisters, then eleven years and thirteen years of age, were put out of the public schools for allegedly assaulting a teacher. The merits of their case, apart from that of the class they represent, is not very important when the fate of all the potential excluded and suspended children of the Charlotte-Mecklenburg School System is considered. The two girls were excluded without a prior due process hearing, and the school administration provided no readily accessible method for gaining a hearing on the merits of any suspension/exclusion case. That continues to be true for the members of the class and for the two girls, now reinstated. A temporary restraining order was sought placing the girls back in school, but no hearing was held by the Court and the appeal of that issue was fruitless for plaintiffs.

In the trial before this Court then, the issue to be considered is whether the school administration must hold a prior due process hearing before punishing students by suspending or excluding them from the school system.

Juvenile Rights

The time is long past when school adminstrators could claim that the children under their control have no rights, either procedural or substantive, which the courts can protect. The cases of In Re Gault, 387 U. S. 1 (1967) and Tinker v. Des Moines Independant Community School District, 393 U. S. 503 (1969) establish the principal that juveniles are constitutionally protected, even when punished for their own supposed benefit, and that they do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker at 506.

Due Process

The landmark case of Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961), cert. den. 368 U. S. 930 (1961) defined the procedural rights of college students. As Professor Wright said: "The opinion . . . had the force of an idea whose time had come and it has swept the field." Wright, "The Constitution on the Campus," 22 Vand. L Rev. 1027, 1032 (1969). Indeed, the idea that denial of a government benefit, or government action to the detriment of an individual requires a due process hearing is one of the most important of our time. The Supreme Court has required a prior hearing before public assistance benefits can be taken from a beneficiary [Goldberg v. Kelly, 397 U.S. 254(1970)]; before prejudgment garnishment [Sniadach v. Family Finance, 395 U.S. 337 (1969)]; before eviction from public housing [Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969)]; [Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970)]; before deprivation of parenthood [Armstrong v. Mauzo, 380 U.S. 545 (1965)]; before deprivation of the right to take a bar examination [Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)]; and before dismissal from government employment [Slochover v. Board of Higher Education, 350 U.S. 551 (1956).]

There is no question that the right to a free public education is as important as any right to be protected by due process. The economic plight of a non-high school graduate is well known, and often court-recognized. See, for example, [Tibbs v. Board of Education of Township of Franklin, 276 A. 2d 165, 114 N.J. Sup., App. Div. 287 (1971),] in which Conford, P.J.A.D., concurring, calls the outcome of such deprivation "startling": (276 A. 2d at 170.) See also Breen v. Kahl, 296 F. Supp. 702 [W.D.Wis. (1969)] aff'd., 419 F. 2d 1034 [7th Cir. (1969)], cert. den. 398 U.S. 937 (1970) at 704 finding a denial of public education to be an irreperable injury. Indeed, the basic premise of Brown v. Board of Education, 347 U.S. 483 (1954) was the value of education.

Nor is the concept of the great value of education a strange concept to North Carolina. "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Art. I, §27. Constitution of North Carolina.

> ARTICLE IX EDUCATION: §1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged. §2. (1) The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students . . . §3. The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

The Constitution has been implemented, in part by G.S.N.C. §115-147, revised in Session Laws of 1971, pamphlet 13.

> The principal of a school shall have the authority to suspend or dismiss any pupil who willfully and persistently violates the rules of the school or who may be guilty of immoral or disreputable conduct, or who may be a menace to the school: Provided, any suspension or dismissal in excess of ten school days and any suspension or dismissal denying a pupil the right to attend school during the last ten school days of the school year shall be subject to the approval of the county or city superintendent: Provided further, any student who is suspended or dismissed more than once during the same school term shall be subject to permanent dismissal for the remainder of the school term at the discretion of the principal, with the approval of the superintendent. In the absence of an abuse of discretion, the decision of the principal, with the approval of the superintendent, shall be final. Every suspension or dismissal for cause shall be reported at once to the superintendent and to the attendance counselor, who shall investigate the cause and deal with the offender in accordance with rules governing the attendance of children in school.

It is improbable that this vague power is compatible with the Constitution of North Carolina, unless the due process rights to be discussed below are read into the statute. In particular, exclusion of a student from all public education is a deprivation of "equal opportunities . . . for all students." Education for "every child" seems to be in conflict with exclusion and suspension for some, especially when administered without due process.

The right to education ought to be at least as important as the right to have access to liquor, although the publicity given the liquor by the drink referendum in Charlotte, in comparison to the lack of analysis of the plight of the schools makes this perhaps a doubtful statement. In the recent case of Wisconsin v. Constantineau, 400 U.S. 433 (1971), the police had posted a notice in all package stores forbidding sale of alcohol to plaintiff because of her alleged excessive drinking. The Court noted that most of the provisions of the Bill of Rights are procedural and that procedure creates the difference between rule by fiat and rule by law. If one is entitled to a hearing before one can be so "posted", hence cut off from purchasing alcohol, a student ought to be entitled to a hearing before being cut off from education.

Indeed, as the Court suggested in Tinker (Id. at 511), a student treated arbitrarily in school learns arbitrariness. Education includes the entire school experience, not just what happens in a classroom. The school ought to inculcate the value of due process and fair play rather than the consequences of living under a rule of fiat.

The Dixon notion of a rudimentary fair hearing has been extended to state schools below the college level in several cases. The Fifth Circuit found that a prior hearing was necessary before a 30 days suspension in Williams v. Dade County School Board, 441 F. 2d 209 (5th Cir. 1971). A similar result was reached in Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969), in Tibbs, supra., and in R.R. v. Board of Education of Shore Regional High School District, 109 N.J. Super. 337, 263 A. 2d 180 (1970). Many school boards, voluntarily or under threat of suit have instituted due process procedures. See the attached student codes of Seattle, Philadelphia, Pittsburgh, and Boston. The extention of due process to the public schools from colleges is thus not a new concept, and not one to be unexpected. As the Seventh Circuit, en banc, said about applying a college freedom of the press case to a high school. "The fact that it involved a university is of no importance, since the relevant principles and rules apply generally to both high schools and universities." Scoville v. Board of Education of Joliet Township High School District, 204, 425 F. 2d 10 (7th Cir. 1971). The question that remains for courts to answer at this point in time is not whether, but how much. What specific due process protections are necessary, when should they be extended, what actions can be taken without due process and against what punishments should the students be protected by due process? [See Buss"Procedural Due Process for School Discipline: Probing the Constitutional Outline" 119 U. Pa. L. Rev 545 (1971).]

Equal Protection

The necessity for due process in school punishment cases is intensified by the Equal Protection Clause of the Fourteenth Amendment. It is clear, after thought, that we deal with the classification of students. Use of the suspension and exclusion procedures selects some students for suspension and exclusion and some to continue on in their schooling. In each case in which a student is sent away, he or she is denied the equal protection of the laws called for by the Fourteenth Amendment and by the Constitution of North Carolina, Art. IX, §2, supra. Our contention is that every student is "normal" or retarded, or physically or emotionally handicapped, or aggressive.

Lines are drawn between students when some defined as educable and some as not. We contend that this distinction is often made on the impermissable grounds of race, and obviously unconstitutional situation. [Loving v. Virginia, 388 U.S. 1 (1967).] That is, a black student would be found not school-worthy in a situation where his white counterpart would get a lesser punishment or none at all. This possibility alone makes the school's classification process suspect. It could not be conclusively disproved that race was not a factor in suspension/exclusion without the compilation of a record during a hearing in each case. Similarly, students may be being denied education in a manner which violates their First Amendment rights of freedom of speech and assembly, and only a record made at a/hearing on their dismissal could disprove that possibility. That is, students may be excluded for distributing leaflets, picketing off school grounds, or otherwise attempting to make known their grievanies. Hence, a hearing is necessary in order to test the possibility, which in every case could otherwise lead to a court suit, that the student is not being classified as uneducable on a wholly impermissable ground. [See, e.g. Vought v. Van Buren Public Schools, 306 F. Supp. 1388(E.D. Mich. 1969).] The Court should note that in the eyes of some people, and infortunately some educators, a black leader exercising First Amendment rights is seen only as a black troublemaker.

But race and free speech apart, classification of students into different groups some able to benefit from public education and some not, must be justified by a compelling state interest Shapiro v. Thompson, 394 U.S. 618 (1969). Education is such a fundamental interest that, when it is to be place in the balance against a state interest, the state must come forward with compelling reasons for the classification. In this, it is an equivilent right to the right to travel at issue in Shapiro, marriage in Loving, and the vote in Harper v. Virginia State Board of Elections, 363 U.S. 663 (1960 and Carrington v. Rash, 380 U.S. 89 (1965). "Education is perhaps the most important function of state and local governments." [Brown v. Board of Education 347 U.S. 483, 493 (1954).]

Courts have subjected classification affecting education to this standard of review before. Hosier v. Evans, 314 F. Supp. 316 [D.C. Virgin I. (1970)], Hobson v. Hansen, 269 F. Supp. 401, 507

[D.D.C. (1967).]Several cases have been recently heard in which courts decided against the rationality of classification of students on the basis of mental capacity to learn. In Wolf v. Legislature of the State of Utah, Civil No. 182646 3rd D.C., Salt Lake County, Utah, (1969) attached hereto, the Court found that excluded retarded children must be admitted to free public education. Similarly, Pennsylvania Association of Retarded Children v. Kurzman _____F. Supp. ____, Civil Action No 71-42, (E.D. Pa., 1971) recently decided by a three judge court ordered retarded children admitted to the public schools. Other suits have been filed and await decision in which courts are asked to find discriminatory classifications implicit in use of English tests to categorize Spanish speaking children as retarded [Diana v. California State Board of Education, N.D. Cal., C-70 37 RFP, see attached stipulation], and are asked to find similar discrimination in classifying blacks and poor students in Boston [Stewart v. Phillips E.D. Mass.]

An Equal Protection approach goes beyond Due Process in that, while a student may be treated fairly and found not able to benefit from standard education, still the School Board may not deprive him of education entirely. If the reason for his exclusion is that he disturbs the learning of others, the solution the Board prefers, namely depriving him of education, is a classification in violation of the Equal Protection Clause. No student who wants education should be denied it. No student should be classified uneducable and left to continue his education on the strees as a vandal, a theif, an illiterate, an unemployable welfare burden or what ever, the School Barad cares not.

Certainly the Board can offer no acceptible justification for not offering some sort of education to these students. Money, i.e. the protestion of the fisc, is not an adequate excuse. [Shapiro v. Thompson 394 U.S. 618, 633 (1969)]. See also Rinaldi v. Yeager 384 U.S. 305 (1966) and Griffin v. Illinois 351 U.S. 12 (1956).

In the case of Knight v. Board of Education of New York, 48 F.R.D. 108 [E.D.N.Y.,(1969)] a school saw fit to exclude its "bad" students to relieve overcrowding. These students presumably were chosen on the basis of absenteeism and poor grades. However, students were given no opportunity to contest these decisions. Some went to night school, or to an inferior annex. Some melted away into the crowd of unemployables on the job market. But the Court found that such an excuse was not convincing and ordered the arbitrarily excluded back into school, with remedial help, and created a hearing board to supervise future exclusions. The State must assert some compelling interest to be served by denying a certain group of children access to education. It cannot do so here.

Even should the lesser Equal Protection test requiring a rational goal rationally related to the means used be asserted as the real measuring stick for those school actions [see U.S. v. Carolene Products, 304 U.S. 144 (1938)], the schools could not meet the standard. While separation of exceptional students from the others might be educationally wise, selection of these children is made on no rational basis. That is, the selection of those to be suspended and excluded is often made on the basis of race, or to remove leaders from the system without the benefit of a due process hearing. Further, exclusion from education for some is not a rational means of achieving the goal of education for the remainder. The school administration could perhaps classify children as exceptional, but this would mean that they need exceptional help, that the retarded need special training, that the aggressive need professional help in channeling their energies into more productive channels. The administration could remove children to special classes, give special testing, and counseling, or give medical help or other different treatment meant to assist its exceptional children. But exclusion from school altogether, for a longer or shorter time, is calculated only to save money by abandoning certain children.

DUE PROCESS BEFORE SUSPENSION

A discussion of the limits of due process in schools is not a denial of the ordinary power of administrators to make rules and regulations so as to keep the schools functioning. It is a denial of arbitrary powers, used irrationally and prejudicially often against black students more harshly than against whites. We do not say that a teacher cannot order a disruptive student from the classroom without a hearing, or administer minor punishments for admitted acts of the student. The teacher can certainly make Johnny pick up the paper he threw or keep him in for talking. But before a teacher or administrator can give any punishment that will affect the school career and future life of a child, a due process hearing is necessary. [See Buss, Supra.]

Serious punishments and decisions which require a due process hearing if challenged by the student include/suspension and exclusion, of course. These two are the punishments extensively used by the Charlotte school system at the present time. But there are other possible devices to which the schools might turn if they had to give due process hearings for suspension and exclusion. These might be: disciplinary transfers, which disorient the student and may inflict hardships on him in terms of loss of friends, school opportunities and travel time; classification into special education, when a student contends he should be in standard classes thereby possibly stunting his future growth; deliberate infliction of corporal punishment by school officials; and serious withdrawal of privileges, e.g. not allowing a gifted athlete to compete, causing him to lose all chance for athletic scholarships. Any of these punishments can seriously alter the course of a student's life. All should require hearings before infliction.

The case of exclusion, we think, is clear, and there is precedent for a due process hearing in such cases as Tibbs, R.R. and

Knight show on the high school level and the Dixon progeny on the college level. But the case for shorter term suspensions requiring due process hearings is not so firmly backed by precedent. It is an issue which is still open for decision. We believe that a prior hearing should be held before any suspension, no matter the length of time contemplated, and that a formal due process hearing should be held within three days after the date of any suspension.

If a teacher can put a student out of the room when the student gets out of hand, why should a due process hearing be necessary for short suspensions? Shouldn't the principal have some emergency powers? In the case of a riot or some similar event, a principal may think that the best way to cool students off is to send them home immediately. In such a case, there should be so many students involved that no individual interviews could be held. But in a more typical case, let us say when a student is put out of class for allegedly arriving late, or chewing gum, or talking back, the principal must make an attempt to evaluate the sitation open mindedly. Was it the case that the teacher treated the student wrongly, which often happens in the classroom, thus precipitating a situation in which the student talks back? Is the student being suspended just to uphold the teachers' authority after a mistake in judgment? In each case in which suspension is considered then, the principal should test for probable cause in as detached a manner as possible. It would be better still if there were another officer in the school, not so intimitely involved with teachers, to make this decision.

A school can offer a prior hearing of this nature, to test the circumstances for probable cause, within hours of the time of the offense. Witnesses can be gathered quickly for most types of offenses, and a short hearing can take place after school. When one considers that a student may be out of class for several days, a hearing of this sort is put into proper perspective.

A minor burden on the administrator is balanced against a major burden on the child.

Consider an example brought forward by an actual case. A white student group and a black group are in verbal conflict. One white student swings a bag containing his gym clothes and strikes a black student who is walking by, and had not been previously involved. The two students scuffle, are broken apart and both are suspended for five days. Presently, before the five days are up, a conference will be called with both students and their parents attending, and it is likely that they will miss "only" three or four days of school. However, that same conference, without the parents, but with some witnesses, could be held on the same day with the same result. The students would be back in school earlier since the misunderstanding would be cleared up earlier. That is, the proper penalty might be seen to be a one day suspension, if suspension is a proper tool of education in any possible circumstances, or some other in-school penalties.

Such a hearing is described in Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 [W.D. Wisc. (1969.] In that case, it was found that there could be no suspension without a full hearing, with all due process elements, unless the presence of the students on campus presented a danger to the campus. If so, there could be an interim suspension but not "without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension." Id. at 420. The point is that students should be kept at studying, in school, and that the danger afforded to the school has to be great before it overcomes the student's interest in not losing time in school.

In Stricklin, the 13-18 days that the students had been out of school before hearing was too long a time. In R.R. a full hearing was ordered within 21 days, and the student was left in school pending the hearing. Similarly, in Williams, an extension of a suspension to an over ten day period was found to require a hearing.

In Banks, the Court allowed suspensions without prior hearing lasting up to ten days. The Court there maximized the possible disruptive effect on the school. While it is true that a student may be gotten out of the classroom immediately, in Charlotte most students have to wait around school for the bus. Heance, the prior hearing can be held after school without taking anyone out of class, and without undue distrubance. It would seem to be a better policy to hold students in school until their parents expect them home, rather than turning them out of school to find their way home from a campus many miles away from the center of the city. The principal will have to talk to the teacher and student involved in any case. It is certainly fairer to test the stories to all parties, to get both sides of the matter and to make a decision in other than an ex parte manner.

In North Carolina a second suspension is grounds of expulsion from the schools. G.S. 115-147, supra. Hence, it would seem to be imperative that a full hearing be held for each suspension before it goes on the student's record. If not, at an expulsion hearing, the student might be left trying to challenge the earlier events, long forgotten by most participants. Further, since it has been the practice to compound suspension, by giving a second immediate, consecutive suspension after the first, it is necessary to have a formal hearing as soon as possible. A string of suspensions could easily amount to an expulsion in fact, since 15 or 20 days out would cause a student to fail his quarter's work or in the case of an over 16 years old, drive him or her out of school. Hence, we believe that, while a student can be sent home in an emergency, it is possible to offer him a prior preliminary hearing, and a full hearing within three days. The full hearing should be held before suspension in most cases. Further, the suspension should not be recorded on the student's record until such a hearing has been held. A three-day time limit before the formal hearing should ensure time enough for both sides to gather evidence and be ready to deal with the questions at issue in a proper manner. If the delay is longer, the student should be allowed to return to school.

Three days is a compromise between allowing time to prepare an desire to not cause the student to lose any time at school at all.

The necessity of a hearing is further brought forward by the fact that, in Charlotte, suspended students have nowhere to go. Students suspended for long periods of time tend not to return to school, especially if over 16. Certainly the suspended student, isolated from others, sees himself in a poor light and develops a negative attutide toward school and himself. Hence the necessity for making up the disadvantages of suspension when students are exonerated. See RR at 188 and Knight at 115.

The school administration will certainly argue that holding such hearing in every suspension case will use up the time of the administration to the extent that they will be able to deal with nothing else. Firstly, such an argument speaks to their excluding and suspending many to many students. The administration is employing a far to drastic punishment, and one of doubtful utility and constitutionality, as its basic means for dealing with students. Secondly, other school systems have seen fit to install voluntary systems of due process as mentioned above. In Seattle, the hearing is held as soon as possible; in Philadelphia, promptly; in Pittsburgh, hopefully on the first day after suspension but, in any case, within 10 school days [See revision]; in Boston, a decision shall be reached within six school days after suspension if the pupil is under 16 and ten school days if he is over 16. We believe that these times give some indication of what a system can do, but cater too much to the system's inertia. If the hearing is going to be held, then it is in everyone's interest that it be held as promptly as possible, so that the suspension causes the least possible disruption.

CHARACTER OF THE HEARING

If the school system is to hold hearings before such punishment can go over three days, what sort of hearings will they have to be? *Dixon*, the first case in this area, specified notice and a hearing at which the student knows the witnesses and evidence against him or her and is given an opportunity to put forth his own defense including the opportunity to produce witnesses and affidavits, 294 F. 2d 150 at 159. Other college cases have provided for counsel *(Scott v. Alabama State Board of Education*, 300 F. Supp. 163 (M.D. Ala. 1969); counsel and cross-examination (*Zanders v. Louisiana State Board of Education,* 281 F. Supp. 747 (W.D. La. 1968); counsel, cross-examination, transcript in both *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968) and *Jones v. State Board of Education*, 279 F. Supp. 190 (M.D. Tenn 1968), aff'd 407 F. 2d 834 (6th Cir. 1969), *cert*. *dism*. *as* *improv*. *granted*, 397 U.S. 31 (1970). Still others have required such elements as impartial tribunal and cross-examination (*Wasson v. Trowbridge*, 382 F. 2d 807 (2d Cir. 1967); and counsel (both *Esteban v. Central Mo. State College,* 277 F. Supp. 649 (W.D. Mo. 1967) and Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (Supp. Ct. 1967); while one case required a decision or substantial evidence (Scoggin v. Lincoln Univ, 291 F. Supp. 161 (W.D. Mo. 1968).

Buss, *supra*, suggests and discusses four elements that should be required: in addition to those of *Dixon*.cross-examination, counsel, impartial tribunal and record. A summary of the attached four school procedures shows the following to be provided:

counsel: legal counsel is allowed in all;

cross-examination: allowed in all;

record: kept by system in all cases except Boston, where it is may be preserved at the expense of the student;

Impartial tribunal: Pittsburgh has a school director as hearing officer; Philadelphia, a Board member; Boston, an assistant superintendent; and Seattle, an impartial hearing officer.

Thus, these procedural guarantees are not far fetched.

Briefly, cross-examination is necessary to test the case of the suspending official and the statements of witnesses. It allows the accused student to participate in the hearing to the fullest extent. It follows that no testimony except that agreed on should be taken by affidavit or hearsay. To gain the most advantage from the cross-examination, the student should have the option of having someone in the hearing as counsel, either a lawyer, or some lay advocate. This person would be skilled in preparing a case and presenting it to the best advantage of the student. (Note that wherever we use student, the parent should also be involved, although at times the two parties may be in conflict, at which time the student should have his own counsel).

The need for an impartial tribunal, i.e. a person not involved in or with interest in the original dispute is obvious. This person would ideally be an independent agent paid by the school system, as is the case in many Federal hearing processes. Alternately, persons from the community might volunteer to hold such hearings, and in Charlotte, these might be concerned ministers or members of the Human Relations Council.

Finally, a record is necessary to perserve the issues for possible review by a higher agency within the system and by the courts at some later date. A gross deprivation of rights could go unrecorded, and, especially, the evidence of the students attack on a rule on grounds of first or fourteenth amendment violations could escape. Further, a record would give a court an opportiunity to reconstruct what actually happened, and give a sounder basis for review that taking evidence de novo in the court room. See Vought for the benefits the court from such a record. This record might be a taperecording kept by the system a simple method of preserving the events.

In addition to those procedural guarantees discussed by Professor Buss, others might be added to the list of a person charged with creating a hearing procedure. In particular, these might require findings to be in writing, within a certain time after the hearing, and that the findings be based on substantial evidence in the record. Such a procedure would greatly clarify the issues on review, and could trim away many issues leaving only the validity of rules, for example, to be tested by a reviewing body.

Relief

Plaintiffs seeks remedies to correst the past, present and future actions of the school administration of the Charlotte-Mecklenburg School System. In the past, students have been put out of school, with hearings at which they could defend themselves. There are presently students suspended and excluded without hearings. Indeed, the suspensions of some students have recently been lenthened from 10 to 15 days in order to give principals more time to investigate their cases, presumably to determine whether they may return to school without upsetting the system or must await trial in District Court for their alleged roles in school disturbances.

At some time, some of these students will become eligible for appeal to the School Board, a little exercised right, and one which coming after their exclusion, and long after they were originally put out of school, does little to remedy their cases. Typically, a student is suspended pending exclusion. Once excluded he can then appeal. This process would take a month to complete, at least, and can in no way be compared to a hearing before punishment. A post-explusion hearing treats the student's loss of time in school as a negligible thing, as it perhaps is to the school administration.

Hence, the proper corrective measure is an Order directing the School System to create a hearing procedure whereby;

1. upon contemplation of suspension or exclusion, a formal hearing is scheduled;

2. a prior hearing is given to each student for whom immediate suspension is contemplated;

3. only those students for who there is probable cause to believe that they are such a menace to the schools that they cannot be allowed to remain in schools pending a formal hearing may be immediately suspended, but a formal hearing will be held within three days and no record can be made of such suspension prior to such hearing;

4. a formal hearing will contain the following due process elements: a) complete notice of the charges and the rules and regulations on which the charges are brought, b) a list of witnesses and a summary of their testimony, c) a summary of other evidence, d) opportunity to make a complete defense, e) cross-examination, f) counsel by the person of the student's choice, g) an impartial hearing examiner, h) a record kept at the system's expense, and i) a decision in writing in five days, j) based on substantial evidence in the record. 5) Further, the school system should be ordered to create an educational facility to which suspended and excluded children can elect to go, which will give them adequate emergency education and counseling including testing by compotent medical and psychiatric experts, rather then turn them out on the streets. 6) In addition, those found to not be liable for suspension and exclusion after hearing should be given emergency assistance in regaining their place in school, as should those students readmitted after suspension. (See R.R., Knight).

To remedy the situation created by the system in the past, it is necessary that 7) a letter be sent notifying all students excluded in the 1971-72 school year that they have a right to a formal hearing, and to reinstatement if found not to warrant exclusion. See Knight. These students should also 8) be notified of their right to attend the emergency facility and to apply for reinstatement at the end of the current semester. Further, all students excluded in the past, and still in the school system, such as our individual plaintiffs should be able to apply for and receive remedial help so as to enable them to make up the past deprivations. 9) ll records of exclusions and suspensions made without due process should be expunged. Only relief on such a scale will enable those students whose consitutional rights and right to a free public education have been violated.

Respectfully Submitted

____________________, 1971

____
Shelley Blum
Attorney for plaintiff

I cerity that I have this day served a copy of this Plaintiff's Trial Brief on defendant by delivering a copy of same to the United State Post Office, postage prepaid, addressed to:

Weinstein, Waggoner, Sturges,
Odom & Bigger
1100 Barringer Office Tower
426 North Tryon Street
Charlotte, North Carolina 28202

________________ ____, 1971

Shelley Blum
Attorney for plaintiff

Exclusion:
Race Discrimination

2.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

RICHARD LEBANKS, et al.	:	CIVIL ACTION
Plaintiffs	:	
	:	NO: 71-2997
versus	:	
	:	
MACK J. SPEARS, et al.	:	SECTION "E"
	:	
Defendants	:	

AMENDMENT AS A MATTER OF COURSE

Plaintiffs hereby amend their complaint, as fully set out in the attached amended complaint, pursuant to Rule 15, F.R.C.P., providing that a complaint may be amended once at any time before a responsive pleading is filed.

Respectfully submitted,

John W. Reed
JOHN W. REED
Attorney for plaintiffs
2643 Desire Street
New Orleans, Louisiana 70117
Phone: 944-7401

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Amendment and Amended Complaint has been served on Franklin V. Endom, Jr., counsel for the defendants by mailing him a copy of same, postage prepaid, this ______ day of ________________________, 1971.

John W. Reed
John W. Reed

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

RICHARD ,
through his mother,
Stella Mae

CLARENCE
through his mother,
Cora

THOMAS ,
through his sister,
Eloise

LETITIA ,
through her mother,
Helen

LARRY ,
through his father,
Anderson

MARGARET ,
through her mother,
Margie Dean

KEITH ,
through his father
Sherman

ENIS ,
through his mother,
Irma Lee

Plaintiffs

versus

MACK J. SPEARS

MILDRED BLOMBERG

EDWARD KNIGHT

ROBERT C. SMITH

LLOYD J. RITTINER
all individually and as
members of the Orleans
Parish School Board

GENE GEISERT
individually and as
Superintendent of the
Orleans Parish School
Board

CIVIL ACTION

NO. 71-2897

SECTION "E"

AMENDED COMPLAINT

ESTELLE KELLY :
individually and as an
employee of the Orleans :
Parish School Board

Defendants :

AMENDED COMPLAINT

I. JURISDICTION

1. This is a civil action to redress the deprivation under color of state and local law of rights, privileges, and immunities secured to plaintiffs and members of their class by the Consititution of the United States, more particularly by the Fifth Amendment, the Thirteenth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment. It is a proceeding authorized by 42 U.S.C. §§ 1981 and 1983 for damages and for preliminary and permanent injunctions to restrain defendants from denying to plaintiffs and members of their class their right to receive public education and instruction.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1343 (3) and (4) providing for original jurisdiction in this Court of actions authorized by 42 U.S.C. §1983. The jurisdiction of this Court is further invoked under 28 U.S.C. §2201 and §2202 relating to declaratory judgments.

3. The amount in controversy exceeds $10,000 exclusive of interest and costs so plaintiffs invoke as an alternative ground of jurisdiction 28 U.S.C. §1331(a).

4. Plaintiffs invoke the pendent jurisdiction of the Court to consider any claims that may be deemed to arise under the laws of the State of Louisiana.

II. PARTIES

5. Plaintiff Richard is a twelve year old Negro citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. He sues through his mother, Stella , who is likewise a citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. They reside at 2030 Feliciana Street, New Orleans, Louisiana.

6. Plaintiff Clarence is a fourteen year old Negro citizen of the Parish of Orleans, of the State of Louisiana and of the United States. He sues through his mother, Cora , who is likewise a citizen of the Parish of Orleans of the State of Louisiana and of the United States. They reside at 607 Gen. Taylor Street, New Orleans, Louisiana.

7. Plaintiff Thomas is a fourteen year old Negro citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. He sues through his sister and next friend, Eloise , who is likewise a citizen of the Parish of Orleans, the State of Louisiana, and of the United States. They reside at 3821 Annunciation Street, New Orleans, Louisiana.

8. Plaintiff Letitia is an eight year old Negro citizen of the Parish of Orleans, of the State of Louisiana and of the United States. She sues through her mother Helen who is likewise a citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. They resides at 525 Peniston Street, New Orleans, Louisiana.

9. Plaintiff Larry is a sixteen year old Negro citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. He sues through his father Anderson who is likewise a citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. They reside at 522 Peniston Street, New Orleans, Louisiana.

10. Plaintiff Margaret is a six year old Negro citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. She sues through her mother Margie Dean , who is likewise a citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. They reside at 1907 Josephine Street, New Orleans, Louisiana .

11. Plaintiff Keith is an eleven year old Negro citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. He sues through his father Sherman who is likewise a citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. They reside at 717 Gen. Taylor Street, New Orleans, Louisiana.

12. Plaintiff Enis is a thirteen year old Negro, citizen

of the Parish of Orleans, of the State of Louisiana, and of the United States. He sues through his mother Irma Lee who is likewise a citizen of the Parish of Orleans, of the State of Louisiana, and of the United States. They reside at 2135 Whitney Avenue, New Orleans, Louisiana.

13. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all citizens of the Parish of Orleans who are similarly situated and affected by the practices and policies complained of herein. The class is numerous that joinder of all members is impractical. There are questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Plaintiffs fairly and adequately represent, and will protect, the interest of the class. The parties defendants have acted or refused to act on grounds generally applicable to plaintiffs' class. Injunctive and declaratory relief are therefore appropriate with respect to the class as a whole.

14. Defendant Mack J. Spears is the President of the Orleans Parish School Board and defendants Mildred Blomberg, Edward Knight, Robert C. Smith, and Lloyd J. Rittiner are members of the Orleans Parish School Board. Collectively and individually defendants Spears, Blomberg, Knight, Smith, and Rittiner are responsible for setting and establishing policies and programs for the public schools in the Parish of Orleans. Defendants Spears, Blomberg, Knight, Smith and Rittiner are sued both individually and in their official capacities.

15. Defendant Gene Geisert is the Superintendent for the Orleans Parish School Board and is an employee of that Board; he is responsible for the operation of the public schools in the Parish of Orleans and for implementing the policies and practices of the Orleans Parish School Board. He is sued, individually and in his official capacity.

16. Defendant Estelle Kelly is in charge of the Special Education Department of the Orleans Parish School Board and is an employee of that

Board; she is responsible for supervising programs and policies for the education of children with special educational problems, including particularly children who are mentally retarded. Defendant Kelly is sued both individually and in her official capacity.

III. RICHARD

17. Plaintiff Richard was born on April 15, 1959 and is presently twelve years old.

18. In September 1964, plaintiff enrolled at age five in a kindergarten class in the Locket Elementary School, a school operated by the Orleans Parish School Board.

19. From September 1964 to September 1969, plaintiff was at all times regularly enrolled and promoted in schools operated by the Orleans Parish School Board.

20. In September 1969 plaintiff at age ten enrolled in a fourth grade class at the Palmer Elementary School, a school operated by the Orleans Parish School Board.

21. After attending the Palmer school for no more than a few days in September 1969, plaintiff was advised by agents of the defendants that he could no longer attend regular classes at Orleans Parish public schools.

22. Plaintiff was so excluded from school in September 1969, on the basis of the defendants' determination that he is mentally retarded.

23. For two years from September 1969 to October 1971 plaintiff received no formal education of any kind from defendants or from any other source.

24. For two years from September 1969 to October 1971, plaintiff was on a waiting list for placement in a special class for the mentally retarded.

25. On October 13, 1971 defendants advised plaintiff that he had been placed in a special class, which he subsequently started to attend.

26. Plaintiff is not aware of the intelligence quotient which has been assigned to him.

IV. CLARENCE

27. Plaintiff Clarence , was born on August 9, 195
and is presently fourteen years old.

28. Plaintiff has been assigned an intelligence quotie
of 57.

29. In September 1963, at age six plaintiff enrolled i
first grade at the Bauduit elementary school, a school operated by the O
Parish School Board.

30. Plaintiff attended the Bauduit school from Septemb
1963 until January, 1970. During this period plaintiff Walker was not
promoted from the second grade.

31. On January 28, 1970 plaintiff was suspended indefi
by the principal of the Bauduit school.

32. Plaintiff has received no formal education since h
suspension in January 1970 when he was twelve years of age.

33. Plaintiff is physically large for his age as well
retarded. Because of this he is unable to function in a regular class w
younger, smaller but more intelligent classmates.

34. Notwithstanding the foregoing facts and allegations, the
Orleans Parish School Board has failed to make any provision for accordi
plaintiff the education which he needs.

V. THOMAS

35. Plaintiff Thomas was born on March 10, 1957 and is
sently fourteen years old.

36. On information and belief plaintiff is mentally ret
and is in need of special education and instruction.

37. Plaintiff attended the first and second grades in S
Antonio, Texas.

38. In 1968 plaintiff moved to New Orleans and was enro
in the second grade at the McDonogh 36 elementary school, a school opera
by the Orleans Parish School Board.

39. In 1969 plaintiff was committed by the Juvenile Court to Scotlandville, a reform school for delinquents, where he stayed about a year.

40. In September 1970, plaintiff enrolled in the fourth grade at the Bauduit elementary school, a school operated by the Orleans Parish School Board.

41. Plaintiff was suspended several times while at the Bauduit school and in late 1970 was either indefinitely suspended, expelled, or otherwise excluded from further attendance.

42. Since that time plaintiff has received no formal education from the Orleans Parish School Board.

43. In June or July of 1971 plaintiff was again committed to Scotlandville. He is still at Scotlandville; his release date is unknown but on information and belief he will be released in January or February of 1972.

44. On information and belief plaintiff had been tested by the Orleans Parish School Board, had been found to be mentally retarded, and had been referred to the special education department where he was put on a waiting list for placement in classes for the retarded.

45. The special education department has since retired plaintiff case from that list and will not make further efforts to place him in a special class on the ground that he has passed the age for placement.

46. On information and belief, the Orleans Parish School Board has a policy of not placing anyone over thirteen years of age in special education classes.

47. As a consequence of the facts alleged in paragraphs 45 and 46 defendants will refuse to place plaintiff in special education classes upon his release from Scotlandville.

VI. LETITIA

48. Plaintiff Letitia was born on July 11, 1963 and is presently eight years old.

49. Plaintiff has been assigned an intelligence quotient of 54.

50. Plaintiff attended for two years, in 1967 and 1968, pre-kindergarten classes at a child development center at the corner of Melpomene and Dryades Streets.

51. In September, 1969 plaintiff at age six enrolled in the first grade at the Bauduit elementary school, a school operated by the Orleans Parish School Board.

52. After attending school for three days plaintiff , through her mother, was advised by the principal of the Bauduit school that she was a problem child and could not be kept in school. Plaintiff was then apparently suspended.

53. Plaintiff was evaluated and tested by the Orleans Parish School Board and was placed on a waiting list for special education.

54. Later in 1969 or 1970, plaintiff family moved to Algiers in New Orleans. While in Algiers plaintiff was enrolled in special classes at the Fischer elementary school, attending half days.

55. In 1970 plaintiff family returned to the Central City area of New Orleans. Plaintiff , through her mother, sought readmission to the Bauduit school on several occasions. Each time she was refused readmission; she was told that she was on a waiting list; and she was told it would be a year or two before she would be placed.

56. Plaintiff is presently receiving no formal education and is still on a waiting list for special education.

VII. LARRY

57. Plaintiff Larry was born on October 1, 1955 and is presently sixteen years of age.

58. Plaintiff has been assigned an intelligence quotient between 44 and 47.

59. On or about September of 1963, plaintiff at age seven enrolled in the first grade at the Bauduit Elementary School, a school operated by the Orleans Parish School Board.

60. After attending school for two days plaintiff was suspended by the principal of the Bauduit school.

61. About six months later, plaintiff , through his mother sought readmission to the Bauduit school. He was advised at that time he could not come back to that school.

62. In or about June of 1964, the Orleans Parish School Board referred plaintiff for testing.

63. As a result of the tests administered by, or under the supervision of, the Orleans Parish School Board, plaintiff was advised by that Board that he could not be taken back into school.

64. Plaintiff has received no formal education of any kind other than the two days in school in 1963.

65. The Orleans Parish School Board has made no effort to follow up the case of Larry or to make provision for his education.

66. The special education department of the Orleans Parish School Board has no record of plaintiff enrollment or testing or existence.

VIII. MARGARET

67. Plaintiff Margaret was born on May 27, 1965 and is presently six years of age.

68. In late October 1971, plaintiff enrolled at age six in a first grade class at McDonogh 36, a school operated by the Orleans Parish School Board.

69. After attending school three days in late October, 1971 plaintiff was sent home and was advised by agents of the defendants that she should remain there until further notice. Plaintiff's mother, Margie Dean , was advised that this was done because the plaintiff cried excessively.

70. In early November 1971, plaintiff was visited by a visiting teacher who took plaintiff to the offices of the Orleans Parish School Board for testing.

71. A short time later the visiting teacher informed plaintiff's

mother that the testing showed that plaintiff was mentally retarded.

72. The visiting teacher notified plaintiff's mother that she was trying to get plaintiff into special classes for mentally retarded children.

73. On information and belief, plaintiff is on a waiting list for placement in classes for the mentally retarded.

74. At the present time and since October 1971, defendants are failing and have failed to provide plaintiff with any sort of education or instruction.

IX. KEITH

75. Keith was born on December 29, 1960, and is ten year old.

76. When Keith was three years old, he was hit and run o by an automobile while he was playing in his yard. As a result of this accident he was confined to a hospital for several years. He is supposed t wear an orthopedic shoe with a (3) three inch lift as a result of injuries to his leg. Upon information and belief, this accident is a source of emotional disturbance to Keith .

77. At the commencement of the 1968 school year, Keith mother enrolled him in the first grade of the Agnes L. Bauduit Elementary School; a school operated by the Orleans Parish School Board. After some months, Keith was suspended for the remainder of the school year.

78. At the commencement of the 1969 school year, Keith was again enrolled in the Agnes L. Bauduit Elementary School. He was reportedly suspended for behavior problems resulting in a determination tha he could no longer be enrolled in that school.

79. During the 1970-71 school year, Keith was enrolled i a special education class as the John J. Audubon School, a school operated by the Orleans Parish School Board. After a few weeks, he was expelled for

being disruptive.

80. On information and belief, plaintiff's intelligence is classified as "slow-learner-retarded" with a higher potential intelligence impeded by emotional disturbance.

81. Since his expulsion from the Audubon School, plaintiff has received no formal education of any kind and no further instruction has been offered or suggested by defendants.

X. ENIS

82. Plaintiff Enis was born on September 7, 1958 and is thirteen years old.

83. Enis is near-sighted and has a cross-eyed appearance. He wears corrective lenses for this disability.

84. At the commencement of the school year in 1964, when Enis was nearly six years old, his mother tried to enroll him in the first grade of the Marie C. Couvent Elementary School, a school operated by the Orleans Parish School Board. Enrollment was refused and denied to Enis, and he was advised by agents of the defendants that he could not enroll until he was given intelligence tests and the school received the results.

85. Enis was subsequently tested by employees of the defendants. As a result of such testing, his mother was informed that Enis was determined to be mentally retarded and that he would be excluded from school. No alternative education was offered or suggested for Enis by the defendants or their employees.

86. At the commencement of the school year in 1966 when Enis was seven years old, his mother enrolled Enis in the first grade of the Murray C. Henderson Elementary School. He was excluded from school several weeks later on the basis of defendants' determination that he is mentally retarded. No alternative education was offered or suggested for Enis by the defendants or their employees.

87. Plaintiff Enis has not been provided any education by

defendants except the few weeks mentioned above, Enis has been taught to recite his ABC's, to count to fifty, and to write his name by his brothers and sisters. He catches on to new tasks and ideas quickly and can care for himself completely. At times he is charged with the care of his younger brothers and sisters who attend school.

XI. ORLEANS PARISH SCHOOL BOARD

88. The defendants' determinations that certain children are mentally retarded are arbitrary and are made without ascertainable standards or for valid reasons. The tests and procedures employed by defendants to determine retardation are biased against Negroes.

89. The defendants refuse, fail and neglect to re-evaluate the mental condition and ability of children classified as retarded so as to determine whether their condition and ability has changed.

90. Defendants maintain a lengthy list of children awaiting placement in special education classes.

91. None of the children whose names are on this waiting list receive education or instruction tailored to their needs as retarded children.

92. Some of the children whose names appear on this waiting list receive regular education or instruction from the defendants.

93. Many retarded children are incapable of benefiting from or functioning effectively in regular classes.

94. Many children, therefore, whose names appear on this waiting list receive no education or instruction of any kind from the defendants.

95. A child's name may remain on the waiting list for an extended period and sometimes indefinitely.

96. The defendants maintain a policy and practice of not placing in special education classes retarded children who have passed the age of thirteen.

97. Many children who are retarded and who are dropped from regular classes are never placed on the waiting list and are never placed

in special classes or readmitted to regular classes.

98. The total effect of the policies and practices described in paragraphs 90 through 97 is that many retarded children are permanently denied access to special education and most are denied access to special education for an extended period. Further, many retarded children are permanently denied access to any form of education and many are denied such access for an extended period.

99. While presently denying plaintiffs here (with the exception of .) any public education, defendants are at the same time providing education to other children in Orleans Parish.

100. While presently failing to provide plaintiffs here (with the exception of) educational opportunities suitable to their condition as "mentally retarded," defendants are at the same time providing educational opportunities to other children who have been classified as mentally retarded.

101. On information and belief, educational opportunities are being distributed by defendants unequally between children considered normal and children considered retarded.

102. On information and belief, opportunities for retarded children are being distributed unequally between white and Negro children to the benefit of whites and to the deprivation of Negroes.

103. The discriminations alleged in paragraphs 99 through 102 are without a rational basis and are not required by any compelling state interest.

104. The failure, neglect, and refusal of defendants to grant them an education are not isolated examples but are a part of a general practice, procedure and policy of the defendants which denies to the mentally retarded a full opportunity to receive an education.

105. The defendants refuse, fail, and neglect to advise retarded children of a right to a fair and impartial hearing or to accord them such a hearing with respect to the decision classifying them as "mentally

retarded," the decision excluding them from attending regular classes, and the decision excluding them from attending schools geared to their special needs.

106. Each of the defendants, and other persons under their control, separately and in concert, has acted willfully, knowingly, and purposefully with the specific intent to deprive plaintiffs of their right not to be deprived of property or liberty without due process of law and their right to the equal protection of the law. These rights are secured to plaintiffs by the due process and equal protection clauses of the Fourteenth Amendment.

107. During all times mentioned herein the defendants, and those persons under their control, separately and in concert, acted under color of law, to wit, under color of the statutes, ordinances, regulations, customs and usages of the State of Louisiana, Parish of Orleans, and City of New Orleans. Each of the defendants here, separately and in concert, engaged in the illegal conduct here mentioned to the injury of plaintiffs and deprived plaintiffs of the rights, privileges, and immunities secured to them by the Fourteenth Amendment and the laws of the United States.

XII. CAUSES OF ACTION

108. The determinations made by defendants that plaintiffs and members of their class are mentally retarded are based on neither valid reasons nor ascertainable standards and are made pursuant to tests and procedures that are biased against Negroes; plaintiffs and their class have thereby been denied their right to an education in violation of the due process and equal protection clauses of the Fourteenth Amendment.

109. The failure of defendants to provide plaintiffs and their class with any education or instruction while providing same to other children of higher intelligence has denied to plaintiffs and their class the equal protection of the laws in violation of the Fourteenth Amendment.

110. The failure of defendants to provide plaintiffs and their class with an education or instruction tailored to their needs as retarded

children while providing same to other mentally retarded children has denied plaintiffs and their class the equal protection of the laws in violation of the Fourteenth Amendment.

111. The provision by defendants of special education unequally to black and white retarded children has denied plaintiffs and their class the equal protection of the law in violation of the Fourteenth Amendment.

112. The failure of defendants to accord plaintiffs and their class hearings to contest defendants' decisions to classify them as retarded, defendants' decisions to exclude them from education, and defendants' decisions to exclude them from special education, has deprived plaintiffs and their class of due process of law in violation of the Fourteenth Amendment.

113. As a result of the actions and inactions of defendants, each of the plaintiffs has wasted and/or is wasting important years of their life. The normal difficulites of retardation have been compounded for each plaintiff by the refusal, failure, or neglect of defendants to give them education or instruction. Each plaintiff places a value of $20,000.00 on his damages.

114. The continuing exclusion of all plaintiffs, except Lebanks, from public school threatens each plaintiff and the members of the class with irreparable injury. Continued deprivation will render each plaintiff and member of the class functionally useless in our society; each day leaves them further behind their more fortunate peers. Exclusion from education is the first step on a road which leads almost inevitably to juvenile delinquency, adult crime, and poverty.

115. Each plaintiff and the members of the class are capable of becoming useful and productive members of society. The continuing denial of education to them will almost certainly effect an opposite result.

WHEREFORE plaintiffs pray for the following relief:

1) That this court award each plaintiff $20,000.00 as damages.

2) That this court enter preliminary and permanent injunctions enjoining the defendants from:

a) Classifying the plaintiffs and members of their class as mentally retarded pursuant to procedures and standards that are arbitrary, capricious, and biased.

b) Excluding the plaintiffs and members of their class from the opportunity to receive a special education geared to their special needs.

c) Excluding the plaintiffs and members of their class from the opportunity to receive any education.

d) Discriminating, in the allocation of opportunities for special education, between plaintiffs, and other black retarded children, and white retarded children.

e) Classifying plaintiffs and members of their class as retarded without first affording a full, fair, and adequate hearing which meets the requirements of due process of law.

f) Excluding plaintiffs and members of their class from the public schools without first affording a full, fair, and adequate hearing which meets the requirements of due process of law.

g) Excluding plaintiffs and members of their class from special education classes without first affording a full, fair, and adequate hearing which meets the requirements of due process of law.

3) That this court grant declaratory relief to the same effect as prayed for in Number 2 above.

4) That this court grant such other further relief as it may deem appropriate.

John W. Reed

JOHN W. REED
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Phone: 944-7401

I. E, F, G, H.

EXCLUSION:

"Emotionally Disturbed":	Association for Mentally Ill Children v. Greenblatt, C.A. No. 71-3074-J (D. Mass.). Papers available at Clearinghouse (#7426).
"Medical Reasons":	Marlega v. Bd. of School Directors of Milwaukee, C.A. No. 70-C-8 (E.D. Wis.). Right to prior hearing established. Papers available at Clearinghouse (#4106).
Pregnancy:	Ordway v. Hargraves, 323 F.Supp. 1155 (D. Mass. 1971). Pregnancy not a valid reason for exclusion; excluded student ordered reinstated.
	Perry v. Grenada Municipal School District, 300 F.Supp. 748 (N.D. Miss. 1969). Being unwed mother no reason for exclusion unless after fair hearing general lack of moral character of student found so great as to taint the education of the rest of the children.
Aliens:	Hosier v. Evans, 314 F.Supp. 316 (D. St. Croix 1970). School system may not refuse admission to non-resident aliens.

SPECIAL EDUCATION AND TESTING

II Special Education & Testing: Due Process & Race Discrimination

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

1, a-b

PEARL , on her own behalf and as next friend of her minor son, LAMONT

JEAN , on her own behalf and as next friend of her minor son, WALTER

LAURA , on her own behalf and as next friend of her minor daughter, SAMATRA

BARBARA , on her own behalf and as next friend of her minor son, JOHN

ANN , on her own behalf and as next friend of her minor son, JOSEPH

SANDRA , on her own behalf and as next friend of her minor son, DAVID

CAROLYN , on her own behalf and as next friend of her minor son, JAMES

Each of the above-named plaintiffs brings this action on his own behalf and on behalf of all those similarly situated

VS.

AGNES PHILIPS, VINCENT P. CONNORS, THOMAS McAULIFFE, WILLIAM TOBIN, WILLIAM OHRENBERGER, JOSEPH LEE, PAUL TIERNEY, JOHN KERRIGAN, JOHN CRAVEN, JAMES HENNIGAN, NEIL SULLIVAN, WILLIAM PHILBRICK, MILTON GREENBLATT, individually and in their official capacities

Civil Action

No.

COMPLAINT

Preliminary Statement

1. This is a class action brought by Boston Public School students and their parents for damages, injunctive, and declaratory relief against officials of the Boston School system and the Board of Education of the Commonwealth of Massachusetts. The action challenges the arbitrary, irrational, and discriminatory manner in which students in the Boston Public Schools are denied the right to an education by being classified as mentally retarded and placed in so-called "Special Classes".

Jurisdiction

2. This action arises under 28 U.S.C. §1331, under the Civil Rights Act, 28 §1343 and the Fourteenth Amendment of the United States Constitution. The cause of action is authorized by 42 U.S.C. §1983 and 28 U.S.C. §§ 2201, 2202.

Plaintiffs

3. A. Walter _____ is twelve years old, black, and is a student in the Boston Public Schools. Walter has been improperly classified as an educable mentally retarded child for approximately one year, and pursuant to this misclassification has been and is being denied the right to

a regular education by being placed in a "special" class. Jean is Walter s' mother and her support and that o her family is provided solely by the Department of Public Welfare.

B. Lamont is eleven years old, black, and is a stud in the Boston Public Schools. Lamont has been improperly classified as an educable mentally retarded child, and pursuant to this misclassification was denied the right to a regular education by being placed in a "special" class for approximately two years. Lamont has recently been reassigned to a regular class on a trial basis, and there is substantial likelihood that he may be improperly placed in a "special" class in the immediate future because of the numerical I.Q. score assigned to him by school officials. In addit an adequate program has not been provided for him to insure a meaningful educational, social and psychological transition t regular class or to attempt to compensate him for the harm caused by misclassification. Pearl is Lamont mother and her support and that of her family is provided sole by the Department of Public Welfare.

C. David is twelve years old, black, and is a stud in the Boston Public Schools. David has been improperly classified for approximately six years as an educable mentally retarded child, and pursuant to this misclassificatio has and is presently being denied the right to an education suitable to his particular needs by being assigned to a "special" class. Carol   is David   's mothe and she and her family are poor.

D. Samatra ____ is eleven years old, black, and is a stu in the Boston Public Schools. Samatra   has been improp classified as an educable mentally retarded child, and pursuant to this misclassification was denied the right to a regular education by being placed in a "special" class for approximately four years. Samatra   has recently been reassigned to a regular class on a trial basis, and there i a substantial likelihood that she may be improperly placed a "special" class in the immediate future because of the numerical I.Q. score assigned to her by school officials. In addition, an adequate program has not been provided for to insure a meaningful educational, social and psychologica transition to regular class or to attempt to compensate her for the harm caused by her misclassification. Laura   is Samatra   's mother and her support and that of her family is provided solely by the Department of Public Welfa

E. Joseph ____ is nine years old, black, and is a stud in the Boston Public Schools. Joseph   has been improperly classified as an educable mentally retarded child for approximately one year, and pursuant to this misclassificat has been and is being denied the right to a regular educati by being placed in a "special" class. Ann   is Joseph
          s' mother.

F. John ______ is twelve years old, white, and is a
student in the Boston Public Schools. John ha
been improperly classified as an educable mentally retar
child for approximately two years, and pursuant to this mi
classification has been and is being denied the right to a
regular education by being placed in a 'special' class.
Barbara is John 's mother and she an
family are poor.

G. James ______ is eight years old, white, and is a stu
in the Boston Public Schools. James has been impro
perly misclassified as an educable mentally retarded chil
for approximately three years, and pursuant to this miscla
fication has been and is being denied the right to an educ
tion suitable to his particular needs by being assigned to
'special" class. Carolyn is James 's mother
her support and that of her family is provided by the Depa
ment of Public Welfare.

H. Plaintiffs Lamont , Walter , Joseph
Sumatra and John bring this action on thei
own behalf and on behalf of all those similarly situated,
all students who are eligible to attend a Boston Public Sc
are poor or black, are not mentally retarded, and have bee
are, or may be denied the right to a regular public school
education in a regular class by being misclassified mental
retarded. Plaintiffs in this class will be referred herea
to as group one plaintiffs.

I. Plaintiffs David and James bring
action on their own behalf and on behalf of all those s
situated, i.e. all students who are eligible to attend
Public School, are poor or black, are not mentally reta
and have been, are, or may be denied the right to be as
to an educational program created for their special edu
needs, under G.L. ch. 71 §46H, by being misclassified m
retarded. Plaintiffs in this class will be referred to
after as group two plaintiffs.

J. Plaintiffs Pearl , Laura , Barbara
Jean , Ann , Sandra and Carolyn
bring this action on their own behalf and on behalf of
similarly situated, i.e. all parents of students who ha
are, or may be placed in a "special" class in the Bosto
Schools without giving those parents an opportunity to
with respect to "special" class placement, an opportuni
review test scores or the reasons for "special" class p
ment, or an opportunity to participate ~~in any~~ meaningfu
understanding way in the decision to place the student
"special" class. Plaintiffs in this class will be refe
hereafter as group three plaintiffs.

K. The plaintiffs in groups one, two and three are s
numerous that joinder of all members of the class is im
cable. There are questions of fact common to all membe
the class in that all student plaintiffs have been or m

improperly placed in "special" class and all parent plaintiffs have not been meaningfully advised or permitted to participate in any way in the decision to place their children in special class. There are also questions of law common to all members of the class in that each person within the class has been subjected to the same violations with respect to "special class placement. In addition, plaintiffs' claims are typical of the class and they will fairly and adequately protect the interests of the class. Prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the state and local officials opposing the class and a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications and substantially impair and impede their ability to protect their interests. The questions of law and fact common to the members of the class also predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pursuant to Rule 23, F.R. Civ. P., plaintiffs, therefore, bring this action as a class action.

Defendants

4. a. Joseph Lee, Paul Tierney, John Kerrigan, John Craven, and James Hennigan are all duly elected members of the Boston School Committee. As such, they are charged with ultimate responsibility for the operation of the Boston Public Schools in general and the 'special' class program for the mentally retarded in particular.

b. William Ohrenberger is the Superintendent of the Boston Public Schools. As such, he has administrative responsibility for the operation of all programs in the Boston Public Schools, including the "special' class program for the mentally retarded.

c. William Tobin is Deputy Superintendent of the Boston Public Schools. As such, he has administrative responsibility for the operation of "special" class programs for the mentally retarded in the Boston Public Schools.

d. Thomas McAuliffe is an Assistant Superintendent of the Boston Public Schools. As such, he is charged with administrative responsibility for Boston School Programs dealing with Mental Health, one of which is the "special" class program for the mentally retarded.

e. Agnes Philips is Acting Director of the Boston Public School's Department of Testing and Measurements. As such, she is charged with the administration of all testing programs in the Boston Public Schools, including the administration of all Stanford-Binet and Wechsler Intelligence Tests for Children

(WISC), used as classifying devices in the placement of plaintiffs in "special" classes for the mentally retarded.

f. Vincent Conners is Acting Director of the Department of Special Classes in the Boston Public Schools. As such, he is responsible for the administration of all special class programs in the city, and has ultimate responsibility for the placement of children in "special" classes for the mentally retarded.

g. Neil Sullivan is Commissioner of the State Board of Education, Commonwealth of Massachusetts. As such, he is charged with administration of all educational programs mandated by State statute and governed by State Regulation including Special Class Programs set forth in G.L. ch. 71 §46.

h. William Philbrick is head of the Division of Special Classes, State Board of Education, Commonwealth of Massachusetts. As such, he is responsible for the administration of all special class programs in the Commonwealth of Massachusetts and enforcement of all State statutes and regulations applicable to those programs.

g. Milton Greenblatt is the Commissioner of the Department of Mental Health of the Commonwealth of Massachusetts. As such, he is charged with the Administration of the Massachusetts Department of Mental Health and with the responsibility of promulgating, with the State Department of Education, regulations for educational programs mandated by State statute including Special Class Programs set forth in G.L.ch. 71 §46.

STATEMENT OF FACTS

5. All of the group one plaintiffs, including the named plaintiffs in that group, have been misclassified mentally retarded, and as a result of their misclassification have been removed from a regular class and placed in classes created for mentally retarded students under G.L. ch. 71 §46.

6. All of the group two plaintiffs, including the named plaintiffs in that group, have been misclassified mentally retarded, and as a result of their misclassification have been denied the right to attend classes established by State law for students with their particular educational handicap, e.g., G.L. ch. 71 §46 M (classes for emotionally disturbed), G.L. ch. 71 §46A (classes for physically handicapped), G.L. ch. 69 §§26,32 (classes for blind or deaf), and G.L. ch. 71 §§ 46K, 46L ((classes for perceptually handicapped), and have been placed in classes created for mentally retarded students under G.L. ch. 71 §46.

7. The placement of groups one and two plaintiffs, including the named plaintiffs, in classes for mentally retarded students is not optional; it is made mandatory by a regulation promulgated by the Departments of Education and Mental Health of Massachusetts:

> "All mentally retarded children with I.Q.'s 79 and below shall be placed in special classes except those cases that are approved by the Department of Education."

8. The placement of groups one and two plaintiffs, including the named plaintiffs, in classes for mentally retarded students was triggered, upon information and belief, because the student was perceived as a behavioral problem. The resulting placement in a mentally retarded class, primarily because of behavior, while other more relevant criteria for referral are ignored, is irrational, arbitrary and necessarily biased the placement decision.

9. All of the group one and group two plaintiffs in this action, including the named plaintiffs, have been misclassified by the Boston School defendants as mentally retarded for a number of reasons including, but not limited to, the following:

(i) Classification, according to customary practice in the Boston Public Schools, is based exclusively upon tests which discriminate against group one and group two plaintiffs in that the tests are standardized on a population which is white and dissimilar to the group one and group two plaintiffs.

(ii) Classification is based upon tests which are not administered or interpreted by Boston School officials sensitively enough to distinguish among a wide range of learning disabilities, only one of which may be mental retardation. Emotional disturbance, perceptual handicap, lack of facility with English language, and cultural difference all tend to depress the single score which the test instruments yield on the basis of which classification is made.

(iii) Classification, according to customary practice in the Boston Public Schools, is based upon a single test score standard for placement in "special" class, and sufficient medical, school, or home background information is neither gathered nor utilized to put the question of appropriate classification into a minimally professional context.

(iv) So-called Boston "school psychologists" are unqualified to interpret the limited classification devices that the Boston School system currently employs. They do not utilize nor do they know how to utilize information pertaining to a child's background. They do not have the competence to administer psychological instruments, more descriptive and more diagnostic of a child's problem, that would help validate or invalidate the results of the intelligence tests that are employed. Boston "school psychologists" have been minimally trained, and thus their testing results in an incompetent, discriminatory, and unprofessional classification.

10. Boston's "special" classes which are essentially segregated from the regular class population, offer substantially different educations to their members and guarantee that a child who is misplaced in the program will be harmed relative to those who are maintained in the regular program. Retesting of those placed in "special" classes is infrequently carried out or is carried out perfunctorily so that an initial classification tends to be final.

11. All of the groups one and two plaintiffs were placed in "special" classes without according them or their parents, prior to placement, adequate notice that such placement would occur or an opportunity to be heard with respect to placement. Group three plaintiffs were not given access to any of the information, possessed by defendants, which purported to justify "special" class placement; they were not in any way informed of the significance or consequences of such a placement; and they were not permitted to participate in any meaningful or necessary way in that placement decision.

12. All of the groups one and two plaintiffs have been misclassified mentally retarded as a result of the direct or indirect actions of the defendants who have acted in bad faith and who have wilfully disregarded the educational interests and constitutional rights of groups one and two plaintiffs, all of whom are members of an "insular minority".

Irreparable Harm

13. Misclassification of groups one and two plaintiffs, including the named plaintiffs, in programs for the mentally retarded results in substantial educational, psychological, and social harm in that their inappropriate placement in "special" educational programs guaranteed that they will receive less education than similarly situated students who have not been misclassified and left in the regular program. In addition, the longer a misclassified student remains in "special" class,

the farther behind his fellow students he falls since they are constantly moving ahead educationally while he necessarily wil not progress educationally because of the nature of the "special" class program. Moreover, if a misclassified student is returned to regular class he will remain irreparably harme because of misclassification, since similarly situated student not in "special" classes would have moved forward in their educations while his education remained essentially static. "Special" education misplacement also works intangible social and psycnological harms that are similarly irreparable. Individually, the misclassified students self-esteem goes down his ability to succeed even at the level at which he is placed drops, thus lessening the chance of catching up even if return to the appropriate level; he is exposed to the stigma of menta retardation when the term is not applicable at all. In additi he must also submit to the wider teacher community prejudice about mental retardation which makes it significantly more difficult for him to secure higher educational options, and peer group respect, while at the same time he does not receive any of the off-setting benefits of an educational program responsive only to the needs of students who are actually retarded.

Cause of Action

14. The denial of the right to receive a regular public school education in a regular class to group one plaintiffs wh

are not mentally retarded by placing them in classes for the mentally retarded is arbitrary and irrational, does not serve any legitimate or compelling state purpose and deprives them of the right to Equal Protection of the laws in violation of the Fourteenth Amendment in that students who are similar to the group one plaintiffs with respect to their educational potential are not placed in classes for the mentally retarded and are permitted to receive a regular education in a regular class.

15. Groups one and two plaintiffs who are black or poor are more likely to be improperly placed in classes for the mentally retarded than white or non-poor students who are similar to the group one plaintiffs in every respect, except for their race and income level, in that the manner in which retardation is measured by defendants necessarily causes race and poverty to become significant determinents of placement. Placement of groups one and two plaintiffs in classes for the mentally retarded, therefore, violates their right to Equal Protection of the laws in violation of the Fourteenth Amendment.

16. The denial to group two plaintiffs who are not mentally retarded of the right to receive a special education in a class created for their special education needs by placing them in classes for the mentally retarded is arbitrary and irrational, does not serve any legitimate or compelling state

purpose and deprives them of the right to Equal Protection of the laws in violation of the Fourteenth Amendment in that students who are similar to the group two plaintiffs with respect to their educational potential are not placed in classes for the mentally retarded and are permitted to receive an education in classes created for their special education needs.

17. The denial to group one plaintiffs who are not mentally retarded of the right to receive a regular public school education in a regular class by placing them in classes for the mentally retarded based upon a numerical I.Q. score of less than 80, and other data which is either improperly evaluated, incomplete or not rationally related to the decision to place a student in a class for the mentally retarded is arbitrary and irrational, does not serve any legitimate or compelling state purpose and deprives them of the right to Equal Protection of the laws in violation of the Fourteenth Amendment in that students who are similar to the group one plaintiffs with respect to their educational potential are not placed in classes for the mentally retarded and are permitted to receive a regular education in a regular class.

18. The denial to group two plaintiffs who are not mentally retarded of the right to receive a special education in a class created for their special education needs by placing them in classes for the mentally retarded based upon a numerical I.Q. score of less than 80, and other data which is either improperly evaluated, incomplete or not rationally related to

the decision to place a student in a class for the mental retarded is arbitrary and irrational, does not serve any legitimate or compelling state purpose and deprives them the right to Equal Protection of the laws in violation of Fourteenth Amendment in that students who are similar to group two plaintiffs with respect to their special educat needs are not placed in classes for the mentally retarded are permitted to receive an education in a class created their special education needs.

19. The improper placement of groups one and two plai who are not mentally retarded in classes for the mentally retarded deprives them of an equal educational opportunit therefore violates their right to Equal Protection of the under the Fourteenth Amendment.

20. The failure of defendants to give plaintiff stude and parents adequate notice or any opportunity to be hear prior to denying them the right to receive a regular educa in a regular class by placing them in a class for mentally retarded students, a decision which has significant educat social and psychological effect, deprives plaintiff studen parents of their right to procedural Due Process in violat of the Fourteenth Amendment.

21. The failure of defendants to permit group three pl tiffs to have access to their children's records includin inter alia, the results of intelligence tests and behaviou

reports, deprives them of rights which are the essence o democratic society, to wit: 'to know' and therefore the to be involved in their children's education", and the r to petition the government for redress of grievances in tion of the First, Ninth, and Fourteenth Amendments.

22. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Honorable

1. Award each of the named plaintiffs and each tiff within the class that plaintiffs represent $20,000 compensatory and punitive damages.

2. Issue a declaratory judgment, pursuant to 2 §2201, and a permanent injunction, declaring and enjoini no child may be placed or retained in a "special" class City of Boston unless and until the following procedures complied with:

A. In order to oversee the specification and i ation of the particular remedies discussed below, a spec Commission on Individual Educational Needs (hereafter, "Commission") shall be established, consisting of nine (members.

The Commission shall be constituted by the appro ment of one member each by:

1) the Commonwealth's Commissioner of Educati

2) the Commonwealth's Commissioner of Mental Health;

3) the Commonwealth's Commissioner of Rehabilitation,

4) the President of the Massachusetts Psychological Association, Inc.;

5) the President of the Massachusetts Psychological Center, Inc.;

6) the Mayor of the City of Boston; and

7) the Chairman of the Boston School Committee.

Two members to the Commission shall be parents of students in the Boston School system and they shall be appointed by the Title I Parent Advisory Council to the Boston School Committee.

The Commission shall serve until June 30, 1973, at which time its powers and duties shall be assumed by the agenc or agencies which are required to exercise those powers and duties at the time -- but that agency or those agencies shall continue to carry out the spirit and direction of the Commission.

The Defendants and their agents shall cooperate fully with the Commission.

B. No student shall be denied the right to attend regular classes, because of "special education needs," unless:

a. he is given a "battery of psychological tests" (as described below) that are rationally related to a fair, objective and competent determination of his individiual educational needs;

b. The tests are administered by a psycholo
with qualifications not less than those prescribed by th
American Psychological Association or by a school psycho
functioning under the direct and effective supervision o
a psychologist;

c. The student and his parents are given no
access to all documents, and a prior hearing with respec
his future educational placement; and

d. Placement in other than a regular class
rationally related solely to the students' special educa
needs as determined by procedures approved by the Commis

C. The Commission shall specify psychological t
recognized by the psychological profession as rationally
related to the competent determination of educational ne
from which examiners shall select tests appropriate in t
professional judgment for the evaluation of the needs of
student. Each such evaluation shall include the adminis
of at least one individual test of learning ability
('intelligence'), and may include tests of academic achi
perceptual motor functioning, or personal or social adju

In addition, the initial screening shall conform
regulation #3 of the Department of Education (which requ
the taking of the medical history and a medical examinat

D. Until the School Department has sufficient
fessional staff to carry out these remedies, it shall co
such services from local psychologists and mental healt

agencies (such as hospital outpatient departments, child guidance clinics, the Massachusetts Psychological Center, Inc., and the like) who have been approved for this use by the Commission.

The selection of a particular psychologist shall be at the parents' prerogative, providing they exercise their option to choose within a reasonable period of time.

E. All children now in "special" classes or on waiting lists for placement in such classes shall be re-evaluated immediately and reclassified as to their special educational needs (if any) by means of the administration of a battery of psychological tests by a psychologist (or under the direct and effective supervision of a psychologist), as prescribed by the Commission.

Such re-evaluations shall be performed on or before June 15, 1971.

F. All children who have been improperly placed in "special" classes shall have a special transitional program established to serve their particular educational needs. This special transitional program shall be designed to compensate the misclassified child for the educational loss suffered by him while misclassified and may include special small-group instruction and/or tutoring and/or group or individual counseling prior to the placement of a child in regular classes. It is recommended that the Commission consider the establishment of special physical facilities on an interim basis for these purposes -- that is, a "catch-up school" staffed by appropriate specialists. Such a school may offer help in pre-vocational-training matters as well as more academic "prescriptive teaching". Such a school should also be sufficiently intensive to facilitate children's placement in regular classes (or wherever they belong) promptly.

G. The Commission shall study whether tests for "special" class placement should be administered on a contract basis only or an interim basis or for an indefinite period.

H. No child shall be placed in a "special" class based solely upon an "I.Q. score" nor shall he be placed in a "special" class unless the need for special educational services has been established in an objective, competent and professional manner.

3. Grant such other relief as is just and proper.

By their attorneys,

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I.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PEARL STEWART, ET AL plaintiffs V. AGNES PHILIPS, ET AL	Civil Action No. 70-1199-F

PLAINTIFFS MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTIONS TO DISMISS

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TABLE OF CONTENTS

Page

INTRODUCTORY STATEMENT 1

STATEMENT OF THE CASE 2

- A. The Plaintiffs 2
- B. The Defendants 3
- C. The Misclassification of the Plaintiffs . 4
- D. The Harm Suffered by Misclassification 5

ARGUMENT 7

1. THIS COURT HAS JURISDICTION OVER THE CLAIMS ASSERTED IN THE COMPLAINT 7
2. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED 10
   - A. THE ARBITRARY, IRRATIONAL AND DISCRIMINATORY MANNER IN WHICH BOSTON PUBLIC SCHOOL STUDENTS ARE CLASSIFIED MENTALLY RETARDED DENIES THEM EQUAL PROTECTION OF THE LAWS 10
   - B. THE FAILURE TO ACCORD BOSTON PUBLIC SCHOOL STUDENTS AN OPPORTUNITY TO BE HEARD PRIOR TO DENYING THEM THE RIGHT TO RECEIVE A REGULAR EDUCATION, BY CLASSIFYING THEM AS MENTALLY RETARDED, VIOLATES THEIR RIGHT TO PROCEDURAL DUE PROCESS ... 19
3. THE PLAINTIFFS HAVE NO OBLIGATION TO EXHAUST A STATE ADMINISTRATIVE REMEDY UNDER THE CIVIL RIGHTS ACT PARTICULARLY WHEN THAT REMEDY IS IN FACT INADEQUATE .. 24
   - A. THE FEDERAL COURTS ARE THE PRIMARY FORUM FOR THE ADJUDICATION OF CLAIMS BROUGHT UNDER THE CIVIL RIGHTS ACT 24
   - B. THE ADMINISTRATIVE REMEDY OF "REVIEW" IS NOT, AS A MATTER OF FACT, SUFFICIENT OR ADEQUATE TO PROVIDE THE RELIEF SOUGHT IN THIS COMPLAINT 27
4. THE STATE DEFENDANTS ARE NECESSARY AND PROPER PARTIES TO THIS ACTION 30

CONCLUSION 32

INTRODUCTORY STATEMENT

Asserting the jurisdiction of this Court under 28 U.S.C. §§ 1331 and 1343, Boston Public School students and their parents bring this action to put an end to the widespread practice in the Boston School System of improperly labeling children as mentally retarded. The plaintiffs basic legal claims are that to their detriment they are being denied Equal Protection of the laws in that they are being put into a class, mentally retarded, upon a discriminatory basis and without any rational or compelling state purpose to justify the classification. Secondly, they claim a denial of Procedural Due Process in that the process of classifying children does not include any opportunity to be heard.

This case is presently before the Court upon the defendants' motions to dismiss. The City of Boston defendants assert two bases for their motion: lack of jurisdiction and failure to state a claim. The State defendants, in addition to asserting the failure to state a claim as a basis for dismissal, also assert that they are not necessary or proper parties to this action and that plaintiffs have failed to exhaust administrative remedies provided by G.L. Ch. 71 §46D.

After reviewing the facts, as set forth in the Complaint, plaintiffs will respond to each of defendants claims for dismissal. Those claims, as we will show, are totally without merit, and plaintiffs, therefore, believe that it is appropriate for the Court to summarily deny both motions.

STATEMENT OF THE CASE

A. The Plaintiffs

This is an action brought by seven named Boston Public School students and their parents. The named plaintiffs bring this action as a class action, pursuant to Rule 23, F.R. Civ. P., on behalf of all other similarly situated students and parents.*

Three of the named plaintiffs are presently being denied the right to receive a regular education in the Boston Public School system by being placed in so-called "special" classes for mentally retarded children, established under G.L. Ch. 71 §46. The complaint alleges that these three plaintiffs, although classified as mentally retarded, are not in fact retarded, and that they should be receiving a regular education in a regular class. The complaint also alleges that plaintiffs are not in fact retarded, although classified as such, and that they should be receiving an education suitable to their particular needs, and those particular needs arise because they have emotional problems. See G.L. Ch. 71 §46 H. Finally, plaintiffs who are presently in regular classes, were misclassified mentally retarded and placed in "special" classes for a number of years. The complaint alleges, however, that as a result of their misclassification these two plaintiffs have suffered educational, social and psychological harm and that a program has not been established to attempt to compensate them for the harm they have suffered.

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* The widespread misclassification of students in Boston as retarded has been documented in a recent report. The Way We Go To School, A Report by the Task Force on Children Out of School (1970) at pp. 37-50 (hereafter Task Force Report).

All of the named plaintiffs are poor. They have, therefore, been permitted to proceed in forma pauperis in this action because of their poverty. Two of the named plaintiffs, are white; the other five plaintiffs are black.

B. The Defendants

The defendants in this action are in two categories. The local defendants are members of the Boston School Committee and other school officials who have administrative responsibility for classifying Boston School children and placing them in "special" classes. The state defendants are the Commissioners of Education and Mental Health and the head of the Division of Special Classes in the Department of Education. The Commissioners have the ultimate responsibility, under G.L. Ch. 71 §46, for the operation of all "special" class programs in the Commonwealth. The head of the Division of Special Classes in the

Department of Education also has administrative responsibility for all "special" classes in the state.

C. The Misclassification of The Plaintiffs

The basic complaint of the named plaintiffs is that they have been improperly classified as mentally retarded, and that many other students have been similarly misclassified. The Task Force Report concluded that more than twice as many students in Boston are classified retarded than should be so classified:

> experts in the field of retardation know that a public school system the size of Boston's is expected to have about 1500 children who need special educational services due to impaired mental abilities. Yet the number so identified by the Department approaches 4000 .... Id. at 37.

The widespread misclassification of children in Boston as mentally retarded occurs for a number of reasons. As alleged in the plaintiffs complaint (para. 9), the tests which are utilized to classify children discriminate against poor and black children, the tests are not administered or interpreted by Boston School officials sensitively enough to distinguish among a wide range of learning disabilities, classification is based upon a single test IQ Score without taking into account vital medical, school or home background information, and so-called Boston "School psychologists" are unqualified to evaluate a child's intelligence causing incompetent, discriminatory and unprofessional classifications.

The widespread misclassification of students as mentally retarded is also caused, as alleged in the complaint, because parents of children who are classified as retarded are not regularly permitted to participate in the evaluation of their children's educational needs, are not asked to provide information about their children's background or problems and are not asked to provide a home perspective to school information regarding their children's needs or problems. The failure to consult with parents about their childrens' education is not only an "important factor in the misclassification of so many children" (Task Force Report, Supra at 40), it reflects a callous disregard for the expectations and aspirations of people for their school system in a democratic society.*

D. The Harm Suffered by Misclassification

The plaintiffs allege in their complaint (para. 13) that continuing and substantial harm is suffered from misclassification. Harm is suffered not only because "less education" is provided in "special" classes, but also because exposure to the "stigma of retardation" causes a loss of

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* The defendant Conners has been quoted with respect to his views of parent involvement in "special" class placement: "It doesn't matter if the parents know or not. That's not my worry." Task Force Report, Supra at 40.

"self-esteem" and a loss of "peer group respect" in additio to other "intangible social and psychological harms" result from the isolation which follows the label, retarded child.

ARGUMENT

1. THIS COURT HAS JURISDICTION OVER THE CLAIMS ASSERTED IN THE COMPLAINT

Plaintiffs complaint asserts jurisdiction under U.S.C. §1343 and 28 U.S.C. §1331. It alleges that defend acting under color of state law, are engaging in a practi of misclassifying Boston Public School students as mental retarded based upon an arbitrary, irrational and discrimi process of evaluating the intelligence of students and pl them in "special" classes. The complaint further alleges the cause of action arises under the Fourteenth Amendment it seeks, *inter alia*, compensatory and punitive damages o $20,000 on behalf of each misclassified student.

In *Bell* v. *Hood*, 327 U.S. 678, 681-83 (1946), th Supreme Court set forth the criteria which this Court mus apply in determining whether there is jurisdiction*. The stated that general allegations of constitutional violati confer jurisdiction upon the Court unless the constitutio claims are immaterial or wholly insubstantial and frivolo

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**Bell* was a case in which jurisdiction was assert under 28 U.S.C. §1331. It is clear that the sa general standards would apply for determining jurisdiction under 28 U.S.C. §1343. See also, *Bivens* v. *Six Unknown Agents*, 409 F. 2d 718, 720 (2d. Cir. 1969); *Birnbaum* v. *Trussel*, 347 F. 2d 86, 89 (2d Cir. 1965).

Clearly, plaintiffs claims (discussed in greater detail below) of being denied a regular education by being improperly labele mentally retarded, because of a testing process which discriminates against black and poor children, are not immaterial insubstantial or frivolous Equal Protection claims. See, Hobsen v. Hansen, 269 F. Supp. 401, 511-14 (D.C.D.C. 1967), aff'd sub nom, Smuck v. Hobsen, 408 F. 2d 175 (D.C. Cir. 1969). It would be equally difficult for defendants to assert that the claim that children are being denied the right to receive a regular education, by being labeled retarded, without according the children or their parents any opportunit to be heard, does not raise a substantial claim of a violation of procedural Due Process. See, Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied, 360 U.S. 930 (1961). It is, therefore, the obligation of this Court to "assume jurisdiction to decide whether the allegations state a cause of action on which the Court can grant relief as well as to determine issues of fact arising in the controversy." Bell v. Hood, supra at 682.

Plaintiffs assert the jurisdiction of this Court under both 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §1343 (Civil Rights Act). Having alleged state action and a non-frivolous constitutional claim, plaintiffs have established jurisdiction under section 1343, it not being necessary to allege a monetary amount in controversy for jurisdictional purposes under the Civil Rights Act. *Hague* *CIO*, 307 U.S. 496 (1939).

Because there is clear jurisdiction over plaintif claims under the Civil Rights Act, it is not necessary for Court also to dwell upon its second statutory basis for jurisdiction, 28 U.S.C. §1331. That additional basis for jurisdiction exists, however, because plaintiffs have alle that the amount in controversy for each individual plainti exceeds $10,000, *Bell* v. *Hood*, Supra. That claim can not b regarded as frivolous or "insubstantial," *Hague* v. *CIO*, Su in view of the cost of providing a compensatory education t the misclassified students and in view of their unliquidat claim to compensate them for the educational, social and psychological harm it is alleged that they suffered from be improperly labeled mentally retarded. Cf. *Wiley* v. *Sinkler* 179 U.S. 58, 65 (1900)(claim of $2,500 unliquidated damage for denial of right to vote held sufficient for jurisdicti purposes).

2. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED

This case, as previously stated, is brought under th Civil Rights Act of 1871, 28 U.S.C. §1343 and 42 U.S.C. §19 Therefore, the standard by which this Court must evaluate defendants motions to dismiss for failure to state a claim is well established:

> A case brought under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears "to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim," *Barnes v. Merritt*, 376 F. 2d 8, 11 (5th Cir. 1967). This strict standard is consistent with the general rule. See 2A Moore's, Supra at 2245.

Holmes v. *New York City Housing Authority*, 398 F. 2d 262, 26 (2d Cir. 1968).

A. The Arbitrary, Irrational and Discriminatory Manner in Which Boston Public School Students are Classified Mentally Retarded Denies Them Equal Protection and Due Process of La

In assessing plaintiffs' claim that they are being denied Equal Protection of the laws, it is essential that it be understood what plaintiffs are *not* claiming. First, plaintiffs are *not* claiming that it is unconstitutional for a school system to group students according to their acade ability. Thus, this case does *not* challenge tracking in th

Boston Schools. Second, plaintiffs are not claiming that it is unconstitutional for a school system to establish a separate program for students who are mentally retarded. What plaintiffs are claiming may be summarized as follows:

1. Large numbers of students in Boston are being denied an equal educational opportunity by being improperly labeled retarded and placed in inferior classes which provide less education than regular classes.

2. A significantly disproportionate number of students in Boston who are improperly labeled retarded are black or poor. The effect of the process which produces widespread misclassification, therefore, is to discriminate against minority groups.

3. The process of labeling students retarded in Boston and denying them an equal educational opportunity is totally arbitrary and does not bear any rational relationship to the statutory purpose of providing a special education to students with special needs.

4. The process of labeling students retarded in Boston produces an over-inclusive class, including many students who are not retarded as well as some who are retarded, and the overinclusion of so many non-retarded students is inconsistent with the statutory purpose of providing a special

education only to students who are in fact retarded, and is also totally unnecessary.

5. The defendants should be compelled by judicial order to change the process of labeling students retarded so that students will no longer be denied an equal educational opportunity because of their race, because they are poor, or because of an irrational classification process.

The first question which this Court must consider when examining plaintiffs Equal Protection claim is the appropriate standard for evaluating that claim.* Under the classic test of evaluating the claim, the Court must determine whether the classification bears any rational relationship to the statutory purpose. E.G., Levy v. Louisiana, 391 U.S. 68 (1968); Upshaw v. McNamara, - F. 2d - (1st Cir. December 18, 1970). The statute involved in this case, G.L. Ch. 71 §46, has an obvious purpose which is to insure that the special educational needs of mentally retarded children are met by establishing a special program for them. Since the plaintiffs in this case are not mentally retarded and have no educational need for a special program established for mentally retarded children, it is afortiori that there is no rational basis for classifying them retarded, placing them in a program which is not designed for their needs, and depriving them of a regular education.

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* For a general discussion of the standards to be applied in varying Equal Protection contexts see, Note: Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065 (1969). (Hereafter Equal Protection Note).

If the defendants can come forth with any rational basis for a classification of non-retarded children as retarded and for placing non-retarded children in a program designed only for retarded children, plaintiffs will be quite surprised to say the least. In the event that such an unlikely event were to occur, plaintiffs wish to suggest to the Court that rather than applying the restrained classic test of Equal Protection to their claim, it must apply a more restrictive test in which the State must demonstrate that the classification is required by a "compelling" State interest and the legitimacy of that interest should be given "rigid scrutiny" by the Court. Rigid scrutiny is required in this case for two reasons. First, the interest affected by the classification is a "fundamental interest," the right to an equal educational opportunity. That the right to an equal educational opportunity is a "fundamental interest" has been made clear by the Supreme Court:

> Today, education is perhaps the most important function of State and local governments .... [It] is a right which must be made available on equal terms.

Brown v. Board of Education, 347 U.S. 483, 493 (1954). See also, Equal Protection Note, Supra at 1120 ("Fundamental interests ... arranged in ascending order of importance, are interests such as employment, education, and voting.").

The Second reason that this Court must rigidly scrutinize any claimed compelling interest asserted by the State to support the classification is that the classification in this case is "suspect." It is "suspect" in three separate ways. First, it is alleged that the classification discriminates on the basis of race. See, e.g. McLaughlin v. Florida, 379 U.S. 184 (1964). Second, it is alleged that the classification discriminates against persons because they are poor. See, e. g. Griffin v. Illinois, 351 U.S. 12 (1956). Third, it is alleged that the classification discriminates against a group which is relatively small, particularly vulnerable and politically insulated. See, United States v. Carolene Products, 304 U.S. 144 n. 4 (1938); Hobson v. Hansen, Supra at 507-08.

When examined with "rigid scrutiny" it is clear that the discriminatory, arbitrary and over-inclusive process of classifying children retarded in the Boston Schools is unconstitutional. In the words of Judge Skelly Wright, "... the only explanation defendants can legitimately give for the pattern of classification ... is that it does reflect students' abilities. If the discriminations being made are founded on anything other than that, then the whole premise ... for relegating certain students to curricula designed for those of limited ability [collapses]." ld at 513. Since plaintiffs have alleged that the classifications are not based upon ability but rather upon race, income or incompetent evaluations, the plaintiffs have clearly stated a claim under the Equal Protection clause.

The plaintiffs more specific claim that they are discriminated against because of the use of a standard intelligence test and a single IQ Score to effectuate placement has been recognized in both school and employment contexts. In Hobson v. Hansen, Supra, the Court held unconstitutional the Washington, D.C. tracking system in which standardized intelligence tests were used to assign students to ability-grouped tracks. The Court found that:

> Because these tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status .... Id at 514.

In *Arrington* v. *Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355, 1358 (D. Mass. 1969), Judge Garrity held unconstitutional the use of a standardized aptitude test as the basis for hiring MBTA employees. Citing *Hobson* and analyzing the use of tests in a manner which would apply equally to the present case, Judge Garrity stated:

> If there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them an equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary. See *Hobson* v. *Hansen*, Supra.

See generally, Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1637-69.

It should also be added, with respect to plaintiffs' claim of unconstitutionality because their class is overinclusive, that it is well established that classifications are valid if they include "all [and only those] persons who are similarly situated with respect to the purpose of the law." Tussman & ten Broeck, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 346 (1949). A classic example of an overinclusive classification occurred in *Korematsu* v. *United States*, 323 U.S. 214 (1944) in which all persons of Japanese descent were assigned to special camps during World War II. Although the Supreme Court upheld the over-inclusive classification (over-inclusive because there was no attempt to select only those Japanese who were traitors or spies), it only did so based upon a finding of a war-time emergency. More recently, the Supreme Court struck down, as overinclusive, a Texas statute which prohibited all servicemen stationed in Texas from voting. Carrington v. Rash, 380 U.S. 89 (1965). The statute was held to be unconstitutional because it included resident as well as transient servicemen (without distinguishing between the two groups) within the classification of persons denied the right to vote. In the present case, the class is similarly over-inclusive, including retarded and non-retarded children, all of whom are denied the right to a regular education.

Finally, it should be pointed out that plaintiffs' claim that the classification process in Boston is totally arbitrary also supports their claim that their classification is a violation of substantive Due Process. That the arbitrary actions of State officials is a violation of Due Process was recently alluded to by the First Circuit which stated in another context:

> If Boston's requirements ... were
> patently unreasonable, they may
> violate due process.

Upshaw v. McNamara, ______ F 2d ____(1st Cir. December 18, 1970) (Slip Opinion p. 3 n. 3). Application of concepts of substantive Due Process to the present case in which it is alleged that the "liberty" of students to pursue a regular education is being deprived is particularly appropriate. In various other cases, Due Process has been the basis for striking down School board interference with basic liberties. Thus, in Meyer v.Nebraska, 262 U.S. 390, 399 (1923) it was held to be a violation of Due Process for School officials to interfere with the liberty "to acquire useful knowledge," in Pierce v. Society of Sisters, 268 U.S. 510 (1925) it was held a violation of Due Process to interfere with the liberty to pursue an education at a private school; and in Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970) it was held a violation of Due Process for School officials to interfere with such personal liberties affecting a student's life as his hairstyle.

B. THE FAILURE TO ACCORD BOSTON PUBLIC SCHOOL STUDENTS AN OPPORTUNITY TO BE HEARD PRIOR TO DENYING THEM THE RIGHT TO RECEIVE A REGULAR EDUCATION, BY CLASSIFYING THEM AS MENTALLY RETARDED, VIOLATES THEIR RIGHT TO PROCEDURAL DUE PROCESS

Plaintiffs complaint alleges that prior to denying them a regular education, by labeling them mentally retarded, they were not accorded notice or an opportunity to be heard, although "special" class placement had a "significant educational, social and psychological effect." (paras. 11, 20, 21), and caused substantial harm (para. 13). It is plaintiffs' contention that because of the significance of the decision to deny them a regular education, by labeling them mentally retarded, they were entitled to a hearing.

The right to the protection of procedural safeguards is derived from the basic principle that whenever the Government acts, its actions must at a bare minimum comport with basic concepts of fair play. Although fair play is a concept which varies in its application to particular circumstances, *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960), it is well established that before Government may take significant action with respect to an individual citizen, it must afford that citizen an opportunity to be heard. Thus, it has been held that a governmental agency must accord a hearing before revoking the right to practice law (*Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963), or the right to practice as an accountant

(Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1927)), or the right to enter into government contracts. Conzales v. Freeman, 334 F. 2d 570 (D.C. Cir. 1164), or the right to receive welfare payments (Goldberg v. Kelly. 397 U.S. 254 (1970)), or the right to employment (Birnbaum v. Trussel, 371 F. 2d 672 (2d Cir. 1966).

Courts have been particularly consistent in holding that public schools must accord hearings before meting out discipline. Thus, it has been held that public school students are entitled to a hearing before suspension or dismissal. See, e.g. Dixon v. Alabama, 294 F. 2d 150 (5th Cir.), cert. denied 368 U.S. 930 (1961). The right to a hearing has been recognized for college students (Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967) and for public school students of lower grades. See, e.g., Woods v. Wright, 334 F. 2d 369 (5th Cir. 1964). It is a right which obtains before students may be subjected to a disciplinary transfer. Owens v. Devlin, 69-118-G (D. Mass. 1969).* It is a right which obtains before high school students may be denied the right to participate in interscholastic athletics. Kelly v. Metropolitan County Bd. of Ed., 293 F. Supp. 485 (M.D. Tenn. 1968). It is a right which obtains before high school students may be denied the right to take a college qualifying examination. Goldwyn v. Allen, 231 N.Y.S. 2d 899 (1967).

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* On February 28, 1969, Judge Garrity issued a preliminary injunction enjoining the Boston School Committee from suspending and transferring four junior high school students from one school to another. The case was then settled when the Boston School Committee agreed to new rules giving students the right to a hearing, including the right to counsel to present witnesses and to cross-examine witnesses, in such cases.

The principle that public school students are entitled to the protection of procedural Due Process before they are denied the right to continue to receive a regular education is, therefore, well established. The question in the instant case is what procedures are "due" to the plaintiffs. This question is answered by the broad framework of analysis set forth in Cafeteria & Rest. Wokrs. Local 473 v. McElroy, 367 U.S. 886, 895 (1965):

> ..consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

See also, Hahn v. Gottlieb, 430 F. 2d 1243, 1247 (1st Cir. 1970).

The nature of the government function involved in this case is to provide an education to students. That is the same function that was involved in Dixon, Esteban, Woods, and all the other school cases that have been referred to above and in which it was held that hearings with substantial procedural safeguards are consistent with, and indeed necessary for, the governmental function of providing an education.

The only distinction between this case and the other school cases that have been referred to previously is the nature of the private interest involved. Here students are subjected to the stigma of being labeled retarded and the inferior education provided in a "special" class in response to a perceived behavioral problem (para 8, plaintiffs complaint). It is the plaintiffs contention, however, that the denial of a regular education, by labeling them retarded, is not so qualitatively different from other decisions to exclude students from the benefits of a regular education -- suspension, transfer, expulsion, denial of athletic privileges or the right to take a college qualifying exam -- that different procedural safeguards would be warranted. Indeed, the harm suffered by improperly labeling a child retarded is so significant -- educationally, socially and psycholigically -- that it is even more essential, than in a simple discipline case, to insure that the decisional process is deliberate. A child temporarily disciplined at school can easily transcend the label "discipline problem;" a child who is labeled "retarded," however, will have that stigma follow him to his home, his friends, his teachers, and his prospective employers.

It is no answer for the defendants to assert that the right to seek review of a classification of mental retardation in the Department of Education under G.L. Ch. 71 §46D satisfies the requirements of Due Process. The right to review does not

satisfy Due Process for a number of reasons. First, the
statutory right of "review" is not on its face or as appl
the right to a hearing. The Statute says nothing with re
to the right to written notice of the specific reasons fo
classifying a child retarded, a right to present evidence
cross-examine witnesses, to receive written findings with
respect to the "review" or to even appear before the Depa
In fact, plaintiffs are prepared to prove that the statut
right of "review", as interpreted by the Department, does
include any of the elements of a hearing. Moreover, the
existence of a widespread practice of misclassifying chil
as retarded is the best evidence of the inadequacy of the
review procedure. See, Task Force Report, Supra at 37, 3
Secondly, the right to "review" does not satisfy Due Proc
because it is not a review which is made prior to placeme
but a review which is only available long after the effect
placement decision has been made. *See*, *Stricklin* v. *Boar*
Regents, 297 F. Supp. 416 (W.D. Wisc. 1969). The length o
time involved in securing review by the Department and th
inadequacy of that procedure are additional facts which
plaintiffs are prepared to prove.

3. THE PLAINTIFFS HAVE NO OBLIGATION TO EXHAUST A STATE ADMINISTRATIVE REMEDY UNDER THE CIVIL RIGHTS ACT WHEN THAT REMEDY IS IN FACT INADEQUATE

The defendants, relying primarily upon Armsden v. Cataldo, 315 F. Supp. 129 (D. Mass. 1970), assert that since there is a remedy to "review" misclassifications in the State Department of Education, pursuant to G.L. Ch. 71 § 46D, plaintiffs must exhaust that administrative remedy prior to invoking this Courts jurisdiction. It is plaintiffs position that the principle defendants assert is legally and factually unsound.

A. The Federal Courts are the Primary Forum for the Adjudication of Claims Brought under the Civil Rights Act.

Recent Supreme Court cases have emphasized that federa courts are obligated to determine constitutional questions presented under the Civil Rights Act and that they may not defer to State Courts or administrative agencies for an initia decision. In Damico v. California, 389 U.S. 416 (1967) plaintiffs brought suit under the Civil Rights Act contending that state welfare eligibility requirements were unconstitutional. The lower court dismissed the complaint after finding that plaintiffs had not exhausted available state administrative remedies. The Supreme Court reversed the dismissal of the complaint stating:

> ...the purposes underlying the Civil Rights Act was to provide a remedy in the federal courts supplementary to any remedy any State might have ... relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy. 88 Sup. Ct. Rptr. at 526, 527.

In Zwickler v. Koota, 88 Sup. Ct. Rptr. 391 (1967), the Court reversed the dismissal of a complaint, brought under the Civil Rights Act, challenging the validity of a state criminal statute. The Court stated:

> ...Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts ***we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum. 88 Sup. Ct. Rptr. at 395.

In Monroe v. Pape, 365 U.S. 167 (1961) the plaintiffs brought suit under the Civil Rights Act seeking redress from police conduct which allegedly violated their Fourth and Fourteenth Amendment rights. The defendants contended that plaintiffs were required to exhaust their state judicial remedies before invoking federal jurisdiction. The Supreme Court held:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court. 365 U.S. at 183.

See also *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

In the most recent Supreme Court case concerning the question of exhaustion of administrative remedies, *Houghton* v. *Shafer*, 392 U.S. 639 (1968), the petitioner brought suit under the Civil Rights Act contending that prison officials had unconstitutionally deprived him of his legal materials. The State contended, and the lower Courts held, that petitioner had not exhausted State administrative remedies. The Supreme Court again expressly rejected the contention that State administrative remedies must be exhausted prior to invoking federal jurisdiction, stating: "resort to these remedies is unnecessary in light of our decisions" in *Monroe*, *McNeese* and *Damico*. Id. at 640.

Finally Judge Caffrey's very restrictive interpretation in *Armsden* v. *Cataldo*, Supra of the Supreme Court cases concerning exhaustion does not apply to the present case, even assuming his interpretation is correct. Armsden concerned a case in which a student alleged that it would be unconstitutional for a State college to expel him because of several convictions for violating various narcotic drug laws. The substantiality of this constitutional claim was obviously dubious. In view of that dubious constitutional claim, Judge Caffrey ruled that plaintiff was required to exhaust an available administrative remedy. He based his decision upon Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969) in which the constitutional claim was similarly dubious and in which it was specifically held that the Supreme Court cases rejecting a requirement of exhaustion only applied "where the constitutional challenge is ... substantial." ld at 569 (citing King v. Smith, 392 U.S. 309, 312 n.4 (1968)).

B. The Administrative Remedy of "Review" is not, As a Matter of Fact, Sufficient or Adequate to Provide The Relief Sought In This Complaint.

It is plaintiffs contention that even if exhaustion of State administrative remedies is generally required, it is not required in this case because the remedy asserted to be theoretically available, G.L. Ch. 71 §46D, is not in fact an adequate or sufficient remedy and that to require exhaustion of that remedy "would be to demand a futile act." Houghton v. Shafer, Supra at 640; cited with approval in Eisen v. Eastman, Supra at 569 and in Armsden v. Cataldo, Supra at 131.

The plaintiffs have submitted to this Court the affidavit of attorney Gordon L. Doerfer, as evidence that the State administrative remedy is not adequate. The plaintiffs are prepared, after deposing the appropriate State officials, to present further evidence of the futility of seeking relief from the State Department of Education, if this Court should request additional evidence to demonstrate that futility. There would be little reason to present further evidence, however, since the affidavit of Mr. Doerfer reveals that the State Department of Education, after a delay of over one year, has refused to grant any relief to the State board petitioners who brought their petition as a class action seeking relief which was similar to the relief sought in this action by the same class of misclassified students.

Based upon this affidavit of Mr. Doerfer, this Court must conclude that plaintiffs have no obligation to exhaust the asserted State remedy. There is no obligation to exhaust because the asserted State remedy is a remedy in theory and not in fact, Armsden v. Cataldo, Supra at 131; because the result the State department will reach has been shown in advance, Montanta National Bank of Billings v. Yellowstone County, 276 U.S. 499 (1928), Kelly v. Board of Education, 159 F. Supp. 272 (D. Conn. 1959); because seeking relief from the State board would be a futile act, Houghton v. Shafer, Supra at 640; because seeking relief from the State board would involve unreasonable delay, Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926); and in action, Monorgahela Connecting R. Co. v. Pennsylvania Public Utility Comm., 373 F. 2d 142 (3d Cir. 1967).

Moreover, the asserted State remedy is not adequate, on its face, to provide the relief sought in this action. That State remedy only provides the right to secure review of an individual misclassification. It does not provide for damages to compensate misclassified children for their educational loss incurred while in "special" class (two of the named plaintiffs, Stewart and Veal, are no longer misclassifie and, therefore, the State board would have nothing to review in their cases). It does not provide for a compensatory program for misclassified children. Finally, it does not provide for a broad scope of review of the whole process of classification which would include consideration of the inadequacy of the State's own regulations and the incompetency of school evaluators, and both of these factors must be considered as they contribute to the widespread arbitrary irrational and discriminatory classification process in Boston

4. THE STATE DEFENDANTS ARE NECESSARY AND PROPER PARTIES TO THIS ACTION

The basis for the State defendants' assertion that they are not necessary or proper parties is difficult to discern. The propriety of having named the Commissioners of Mental Health and Education and the Director of the Division of Special Classes as party defendants can be seen by reference to the State laws defining their powers and duties. Under G.L. Ch. 71 §46, the Departments of Education and Mental Health prescribe regulations setting forth the manner in which Boston must determine the number of mentally retarded children within the school system and the manner in which Boston must operate its Special classes. Therefore, the ultimate responsibility for determining the process by which children are classified as retarded and are placed in "special" classes, the basic issues in this case, rests with the Commissioners. In addition, the state reimburses Boston for one half the cost of providing instruction for mentally retarded children, if the Department of Education certifies that Boston's programs "meet the standards and requirements" of the Department. G.L. Ch. 69 §29 B. Moreover, the Department of Education has the express power to review inidvidual cases in which children are classified retarded. G.L. Ch. 71 §46D.

With respect to the Director of Special Classes who is a subordinate of the Commissioner of Education, his responsibilities are also spelled out by statute. He is obligated to "direct and supervise all special education supported in whole or in part by the Commonwealth" and he is responsible for insuring "compliance ... with the program of special classes established under" G.L. Ch. 71 §46. G.L. Ch. 69 §29A.

Since it is the State defendants who ultimately regulate the process of classifying children as retarded in Boston, the plaintiffs named them as party defendants so that this Court would have the power to enjoin them from continuing to promote and permit a process of classification which is unconstitutional. It, therefore, should be apparent that in the "absence [of the State defendants] complete relief cannot be accorded among those already parties." Rule 19 (a), F. R. Civ. P. As Professor Moore has stated, this Court should determine whether the State defendants are indispensable by asking: "can the district court effectively grant the relief sought with a decree directed at the subordinate official who is before the Court?" , 3A Moore's Federal Practice ¶1916 [2], p. 2536. See, Thaxton v. Vaughan, 321 F. 2d 474 (4th Cir. 1963) in which the Court held that the action was properly dismissed where the plaintiffs failed to join, as party defendants, public officials who possessed the actual authority to make the policy decisions with respect to the issues before the Court. See, also, Rule 20 (a), F. R. Civ. P.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that defendants motions to dismiss must be denied.

By their attorney,

Michael L. Alt

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Tel: 442-0211

CERTIFICATE OF SERVICE

I, Michael L. Altman, certify that on December 31, 1970, I mailed, prepaid, a copy of the above Memorandum to Edith Fine at New City Hall, Boston and to Mark Cohen, Attorney General's Office, Boston.

MICHAEL L. ALTMAN

From 7 Inequality in Education 38-39

Supreme Court

RULING ON "POSTING" DRUNKS APPLIED TO SCHOOL STIGMATIZATION

Wisconsin v. Constantineau, 39 U.S.L.W. 4128 (January 19, 1971).

Litigation on special education, tracking, remedial programs or on the many other ways in which schools classify children may be affected by the United States Supreme Court's ruling on state stigmatization in *Wisconsin v. Constantineau*. The Court ruled that a Wisconsin law requiring the posting of the names of alleged problem drinkers in taverns and package stores for the purpose of preventing the sale of liquor to them constituted stigmatization serious enough to require due process. Posting, under Wisconsin practice, was done without prior notice or hearing at the request of any one of a number of minor public officials, elected and appointed, or at the request of the "wife" of the alleged problem drinker.

The *Constantineau* reasoning has already been applied by a federal district court in Boston in denying a defendant's motion to dismiss in a suit seeking, in part, to require the Boston school system to provide a prior hearing for children classified as retarded. [*Stewart v. Phillips*, Civil Action No. 70-1199-F (D.C. Mass. February 8, 1971); See *Inequality in Education*, Number Six, page 20] Plaintiffs' supplemental memorandum in *Stewart* on the applicability of *Constantineau* to the case is reprinted below:

"This case arose when the chief of police of Hartford, Wisc., posted a notice in all retail liquor outlets in Hartford forbidding sales or gifts of liquor to Norma Grace Constantineau for one year. Such a procedure was authorized upon a finding that the person so 'posted' exhibited specified traits as a result of 'excessive drinking.' Mrs. Constantineau, however, was afforded no notice nor opportunity to be heard prior to the posting of her name. Speaking through Mr. Justice Douglas, the Supreme Court stated, and resolved, the constitutional issue as follows: 'The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

> 'It is significant [the Court continu
> most of the provisions of the Bill
> are procedural, for it is procedure th
> much of the difference between ru
> and rule by fiat . . .
>
> 'Where a person's good name, re
> honor or integrity are at stake be
> what the government is doing to hi
> and an opportunity to be heard are
> *'Posting' under the Wisconsin Act n*
> *some merely the mark of illness; to*
> *is a stigma, an official branding of*
> *The label is a degrading one.* U
> Wisconsin Act, a resident of Ha
> given no process at all. This appellee
> afforded a chance to defend her
> may have been the victim of an
> caprice. ***Only when the whole pro***
> ***leading to the pinning of an unsav***
> *on a person are aired can oppress*
> *be prevented.'*
>
> *Constantineau, supra*, at 4129.
> added]

"For the Court's convenience, w
copy of the *Constantineau* decision. T
similarity of *Constantineau* to the pre
however, warrànts at least brief commen

"*First*. Observe that in *Constant*
fact that the State's purpose was reme
than punitive was considered irrelevan
Court. The critical fact was not whether
intended to stigmatize, but whether t
action in fact *resulted* in stigmatization.
found that it did. The same is true he
very least, plaintiffs are entitled to a tr
issue.

"*Second*. It cannot be doubted tha
'retarded' does in fact stigmatize or bra
so labeled. In *Constantineau*, Justice
observed that the characterization of
implicit in the 'posting'

> 'Though a mark of serious illness t
> to others . . . a stigma or b
> disgrace . . .'
>
> *Constantineau, supra*, at 4128.

So here, while some may regard a 'retar
with humanity and compassion, others,
itable, will treat such a child with scorn
derision or worse. Mr. Justice Douglas's
Constantineau reflects the fact that *a*
behave as children in the cruel way in w
sometimes treat unfortunate fellow bein

"Ruling on 'Posting' Drunks ...." con't:

present case we deal with children themselves, and their reactions to each other.

"*Third.* The label 'retarded' in the present case is far more damning than the label involved in *Constantineau*. This is especially so where the victim is a child, more malleable and impressionable than an adult, far less able to fend for and defend himself. Labeling a child as 'retarded' not only brings derision from his fellows, but, because children are impressionable, may alter the child's concept of himself as well. In this sense the process can produce a self-fulfilling prophecy, and, as we have pointed out in our earlier memorandum, thus do inestimable psychological and emotional harm to the child.

"*Fourth.* Procedural due process requirements of fairness are even more essential in the present case than in *Constantineau*, for here we have not only stigmatization but loss of the fundamental right to an education as well."

Special Education & Testing: National Origin & Language Discrimina
Due Process

II B

VI. DIANA V. CALIFORNIA STATE BOARD OF EDUCATION

1.a

United States District Court
Northern District of California

Plaintiffs

(9 Mexican-American school children and
their parents as representatives.)

vs.

Complaint for Injunction
and Declaratory Relief
(Civil Rights)

Defendants

(State Board of Education; Superintendent
of Public Instruction, Comptroller, and
Treasurer of the State of California;
Board of Trustees and Superintendent of
the Soledad Elementary School District.)

Jurisdiction

1. This action arises under the Constitution and laws of the United States including the Fourteenth Amendment to the Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act. It also arises under the Constituti and Laws of the State of California, Education Code (right to education and education of mentally retarded minors). A declaration of rights is sought under the Declaratory Judgment Act. Jurisdiction of this court is invoked under Title 28 U.S.C. and Title 42 U.S.C. The amount in controversy herein exceeds the sum of $10,000 exclusive of interest and costs.

Classes for Mentally Retarded

2. The State of California authorizes separate classes for mentally retarded children. These classes provide children minimal training in reading, spelling, and math. They also teach children body care and cleanliness, how to slice meat, how to fold a piece of paper diagonally, and how to chew and swallow food. Section 6902 of the California Education Code states that such class should be designed "to make them (the children) economically useful and socially adjusted."

3. Placement in one of these classes is tantamount to a life sentence of illiteracy and public dependence. The stigma that attaches from placement causes ridicule from other children and produces a profound sense of inferiority and shame in the child. It is therefore of paramount importance that no child be placed in such a class unless it is clear beyond reasonable doubt that he suffers from an impairment of ability to learn.

Placement

4. Between the ages of four to eight a number of school children are individually given an "IQ" test supposedly desig to measure their intellectual ability. Generally either the Stanford-Binet or Weschler test is given and in most Californ counties the tests are given only in English. In Monterey County School Districts a score of 70-55 on the WISC test or 68-52 on the Stanford-Binet results in placement in an EMR (educable mentally retarded)class. Most school districts in California use this same scale as a basis for placement of elementary school children in EMR classes. On the basis of such tests each of the plaintiffs was placed in an EMR class.

Plaintiffs

5. The first group of individual plaintiffs are Mexican-American school children and their parents as representatives Each child comes from a family in which Spanish is the predominant, if not the only, spoken language. Each has been in a class for mentally retarded children for periods of time up to three years. Each attends school in the Soledad Elementary School District, Monterey County, California.

6. The second group of plaintiffs are other children of the same families with the same language and culture background. Some are pre-schoolers about to enter school and the others are now in first and second grade and are about to be given IQ tests. All fear the system will inevitably lead to their placement in a class for mentally retarded.

7. Plaintiffs are not mentally retarded and they never have been. Several of them are probably above average in intellig They have been the victims of a procedure which tested their facility in English, a language they had not been effectively taught. The addition of just one ingredient--a bilingual tes armed with tests in both Spanish and English--demonstrates th dramatically.

8. The IQ scores of the nine plaintiffs when tested solely in English by a non-Spanish speaking tester ranged from 30-72 with a mean score of 63 1/2. On November 1 and 2, 1969, each of the nine was individually retested by an accredited California School psychologist. Each was given the WISC test (in English and/or Spanish) and each was permitted to respond in either language. Seven of the nine scored higher the maximum score used by the county as the ceiling for mental retards. These seven ranged from 2 to 19 points above the maximum with an average of 8 1/2 points over the cut-off. One of the other two scored right on the line and the ninth student was three points below.

One child improved 49 points over an earlier Stanford-Bi test. Another jumped 22 points. Three other children showed very substantial gains of 20, 14, and 10 points. The average gain was 15 points.

Invalid IQ Comparison

9. The IQ test is a comparison of children at the same age levels. Thus, a boy age 11 years and 2 months is compared with all other school children aged 11 years, 2 months, to compute his mental ability. But one does not intuit arithmetic. He must be taught multiplication and world history and geography to be able to answer questions about them. The whole notion that children should be compared to their own age group is based on the assumption that such children will have had similar exposure to learning, not on any physiological growing or expansion of the brain.

10. The plaintiff children in Soledad range in age from 8 to 13 years, yet they are all taught together in one room of the Soledad Elementary School. They are sometimes divided into two groups for teaching but that is the extend of differential treatment. Since there is only one teacher for the class, the two groups are taught simultaneously. The children spend substantial class time coloring and cutting out pictures. An eleven-year-old characterized the classroom activities as "babystuff." One of the younger children cries frequently making teaching in the class very difficult. While the plaintiffs in their EMR class receive this limited "3 R's" education, 98% of the school children the same age have had 5 years of formal school training. If the recent WISC tests taken by the nine plaintiffs had been compared with scores achieved by children two years younger and thus exposed to roughly the same opportunity to learn, the IQ's of the nine would be 108, 107, 101, 99, 94, 93, 91, 89 and 81.

11. Because of the widely dissimilar exposure to learning offered to children from low income and minority families, it is well documented that IQ score has no relation to the ability of such children to learn. Seymour Sarason, Thomas Gladwin, and Richard Hasland, Mental Subnormality (1958); Anne Anastasi, Psychological Testing (3rd Ed. 1968); W.S. Neff, "Socio-economic Status and Intelligence: A Critical Survey," Psychological Bulletin, XXXV (1938), Rodges Hurley, Poverty and Mental Retardation--A Causal Relationship, (1969); Allison Davis and Kennedy Bells, Davis-Bells Test of General Intelligence (1968). These are just a few of the treatises on the subject. Alfred Binet, creator of the IQ test, points out: "Some recent philosophers appear to have given their moral support to the deplorable verdict that the intelligence of an individual is a fixed quantity we must protest... A child's mind is like a field for which an expert farmer has advised a change in the method of cultivating, with the result that in the place of desert land, we now have a harvest."

Heavy Emphasis on Verbal Skills

12. The Weschler (WISC) test is divided into two parts labeled (1) "Verb, and (2) "Performance." The "verbal" part contains the vocabulary, general information, story problem arithmetic, word similarities, and moral comprehension sections. The "performance" part, by contrast, requires only enough verbal skill to understand test directions. The performance

sections require children to complete pictures, use codes, arrange pictures in the right order, assemble objects, and use blocks to make designs. The results of the nine plaintiffs on the two sections show clearly the impact culture and language have on their ability to perform well on the test. On the verbal IQ scale their mean score is 75 and the median 74. Their performance IQ scale shows a score that averages 10-11 points higher with a mean of 84 and a median of 86. One child had a verbal IQ score of 62 and a performance of 83. Another scored only 67 on the verbal IQ section but shows a performance IQ of 96. Since the child at age 8 1/2 has never ever been taught the alphabet, it is no wonder that she cannot cope with the verbal sections of the test. Her situation is not unique. Achievement tests given to these children show that 8 of the 9 are only at first grade level or lower in both reading and spelling. None of the children has a performance IQ below the maximum ceiling for mental retardation used in Monterey County and only 3 have scores in the 70's.

13. The Stanford-Binet test, by contrast to the WISC test, is 100% verbal. A plaintiff was tested in English only in the Stanford-Binet by Monterey County testers and scored an IQ of 30. Even though this result is patently absurd--persons with IQ that low cannot physically care for themselves--no note of possible cause of this score is made on her record.

Culture Bias

14. A few sample test questions will suffice to show the problem that the Mexican-American, rural child encounters. The General Information section of one of the IQ tests includes: "Who wrote Romeo and Juliet?" and "When is Labor Day?" It asks "What is the color of pies?" instead of "What is the color of plums?" General Comprehension asks, "Why is it better to pay bills by check than by cash?", a very difficult question for a child whose parents have never had a bank account. The vocabulary section asks about "umbrella, not "sombrero," "microscope," not "magnifying glass," and "chattel," not "slave." The test also asks children to identify "C.O.D.", "hieroglyphic," and "Genghis Khan."

15. The most important source of knowledge for the child, particularly the pre-schooler, is his parents. Parents obviously can't teach more than they know. In the Mexican-American home the information that is forthcoming will be in Spanish and will be more likely to relate to Mexico and the Mexican cultural values than to the United States and its values and laws. The middle class parent spends time with his children teaching what psychologists have termed the "hidden curriculum." Thus the middle class Anglo-American child is intensively tutored by his parents including correction of speech, grammar, syntax, and style while his Mexican-American counterpart has not yet been exposed to the language. Thus any test relating to verbal skills is totally invalid as any indication of the learning ability of such Mexican-American children.

16. The farmworker child grows up without awareness of or experience with books, pictures, or magazines. There is a paucity of objects in his home. Of course, a child cannot identify

what he has never encountered. Rarely has a Mexican-American child from Soledad been further from home than Salinas, the major town in the county some 30 miles away (unless it is to move to a different labor camp). Zoos, museums, libraries, airports, and art galleries are unknown and unexplored.

17. The Mexican-American family is generally closely knit and usually requires its members to begin assuming responsibility at an early age. Tests conducted by the California State Department of Education in Wasco, California, in 1968 showed that Mexican-American children scored "considerably higher than the middle-class normative population." in social ability and adjustment. Major examples of culture values cited by the report as the cause of this finding were emphasis on (1) self-care of children at an early age, (2) care of younger siblings, (3) significant housework assignments, (4) helping to earn income, and (5) sharing in adult decision-making. These skills will help the Mexican-American child to do well in school. However, these skills are not measured by IQ tests and are not relfected in overall score.

18. Experiments have uniformly proved that IQ score jumps with cultural environment and family income. Studies show relative variant 30-50 IQ points upon changed circumstances.

Tests Not Properly Standardized

19. Present IQ tests related in subject matter solely to the dominant cult and they were established solely by testing members of that culture. The Stanford-Binet test was standardized, i.e. its scales were constructed, 1937 by giving the test to 3,184 subjects. Every subject was a white native American. The test has not been restandardized since 1937. Even rural American is clearly underrepresented in the sample group. The WISC test was constructed in 1950 by testing 2,200. Again, only Anglo-American children were tested and again there has been no restandardization.

Statistics

20. Besides the nine plaintiffs, there are four other children in the EMR class in the Soledad Elementary School District (the other four were unavailable for testing on November 1 and 2 when the nine plaintiffs were individually tested). Twelve of these thirteen (92%) are Mexican-American. In Monterey County Spanish surname students constitute about 18 1/2% of the student population, but constitute nearly 1/3 (33%) of children in EMR classes. This figure is representative of the discriminator, overpopulation of Mexican-American children in EMR classes throughout the state.

There are approximately 85,000 children in EMR classes across California. A study of racial distribution in the state's public schools during the 1966-67 school year revealed that 26% of the children in EMR classes were of Spanish surname while such students comprised only 13% of the total student population. It is statistically impossible that this maldistribution occurred by random change (odds in excess of 1 in 100 billion).

State Recognition of the Inequity

21. In June of 1969, John Plakos of the California Department of Education randomly selected 47 Mexican-American children in EMR classes within the state. Approximately 50% were in urban areas and 50% were rural. They were individually tested in Spanish. Forty-two (42) of the forty-seven (47) scored over the IQ ceiling for MR classification. Thirty-seven (37) scored 75 or higher on the test, over half of the students scored higher than 60, and 1/6 of them scored in the 90's and 100's. Their average improvement over earlier tests was 13, 15 IQ points. They scored an average of 8 points higher on performance IQ than on verbal IQ, with nine children scoring at least 20 points higher on the performance sections.

22. On August 6, 1969, the California Assembly passed House Resolution No. 44 recognizing that "a disproportional number of children from such groups (minority groups) are assigned to classes for the mentally retarded. The Resolution calls upon school psychologists, school districts, and parents to undertake careful re-evaluation of all students than in EMR classes and "strongly urge(s) the State Board of Education to give attention and aid to proposals for charges in the structure of special education (MR) categories.

23. State Superintendent of Instruction, Max Rafferty, has publicly gone on record stating that a child who can't be tested in his own language shouldn't be tested at all. If the test instrument is discriminating against a kid because he speaks Spanish then the test is wrong and should be discarded.

24. Nevertheless, local school districts have not undertaken any procedure to remedy the current situation.

25. The unlawful EMR placement at Soledad was specifically brought to the attention of the school district by one of the children's parents in September, 1969. On December 15, 1969, plaintiffs' attorneys met with Soledad Elementary School Superintendent to review the facts and see agreement on reclassification of the children. All of the allegations of this complaint--including (1) the high IQ scores on the retest, (2) the statewide pattern of discriminatory placement of the Spanish speaking in classes with mental retards, and (3) the great harm being caused and urgency of quick action were discussed with him and two days thereafter complete copies of the test results and recommendations obtained by psychologist Victor Ramirez were provided to him. The superintendent asserted that these findings confirmed his own suspicion that unfair testing of Mexican-Americans occurs. He unequivocally indicated that he could reassign the children immediately after Christmas vacation to regular classes and that he could use existing facilities for high powered supplementary training in language and mathematics to correct past deficiencies caused by their improper placement so that the children would be fully integrated into the normal program as quickly as possible. He stated that the Christmas vacation provided the most opportune time for this transition as the school would devise a schedule during this period and the children in the school would accept the change as a natural one. He further assured plaintiffs that the tests already administered to the children would be sufficient so long as the psychologist who administered them was certified by the State of California.

26. On December 30, 1969, 15 days after school officials had promised to reassign the children, an agent of the school district sent a letter to plaintiffs changing the school's position, indicating that a "complete study" would be necessary, and asking for further documentation. In spite of plaintiffs' warnings in response that any further delay in providing the children with a regular educator would endanger their chances to make up for the three years of deprivation already suffered, the children upon return from Christmas vacation January 5, 1970, were and are presently forced to stay in the class for mental retards.

Class Action

27. This is a proper classification within Rule 23 of the Federal Rules of Civil Procedure. Plaintiff children represent two classes.

A. Bilingual Mexican-American children now placed in California classes for the mentally retarded.

B. Pre-school and other young bilingual Mexican-American children who will be given an IQ test and thus be in substantial danger of placement in a class for the mentally retarded, regardless of their ability to learn.

They bring this action on their own behalf and on behalf of all others similarly situated, pursuant to Rule 23 of the Federal Rule of Civil Procedure. There are common questions of law and fact affecting the rights of minor plaintiffs herein and the rights of all other members of the classes. The classes are so numerous that joinder of all the members is impracticable. The representative parties will fairly and adequately protect the interests of the classes and their claims are typical of those of other class members.

Defendants

28. Defendants include the Superintendent of Public Instruction for the State of California and in said capacity is responsible for administration of all school programs including classes for the mentally retarded; members of the State Board of Education, and thus empowered to issue regulations relating to placement in California EMR classes; Comptroller of the State of California; State Treasurer; Superintendent of Schools for the Soledad Elementary School District; and trustees of the Soledad Elementary School District.

Right to an Education

29. The right of every child to an equal education is fundamental in California. The California Constitution states that: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year..." Pursuant thereto, Education Codes place the duty to maintain schools and classes on the governing board of the school districts and require the school boards, insofar as possible, to maintain their schools "with equal rights and privileges."

30. Pursuant to the Civil Rights Act of 1964, regulations were published in the Federal Register which provide that "each school system has an affirmative duty to take prompt and effective action to eliminate...discrimination based on...national origin, and to correct the effects of past discrimination." The regulations further require equal opportunity in available classes, curricula, school activities, teachers, facilities, and text books.

31. Schools presently receive extra money for every child assigned to an EMR class. Unfortunately this acts as an incentive to placing and retaining children in these classes. However, substantial money is available to school districts from other sources both to remedy the damage done by misassignments of children to mentally retarded classes and to provide language assistance to children at early grade levels who are not fluent in English. These sources include (1) Title I of the Elementary and Secondary Education Act, (2) Title VII, the Bilingual Education Sections, (3) Aid to the Emotionally Handicapped, (4) The Miller-Unruh Act.

Controversy

32. There is an actual controversy now existing between the parties to this action as to which plaintiffs seek the judgment of this court. Plaintiffs seek a declaration of the legal rights and relationships involved in the subject matter and controversy.

Irreparable Injury

33. As a direct result of being placed in an EMR class, plaintiffs and the class they represent are being denied their right to receive an education, their right to equal educational opportunity, and their right to not be placed in a segregated classroom, as guaranteed by Federal and State law and the Due Process and Equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

34. Unless plaintiffs and the class of bilingual or Spanish speaking children in EMR classes are taken out of the mentally retarded program, placed in regular classes, and given intensive supplemental training in language skills and mathematics to allow them to catch up to their peers, they will continue to suffer the immediate and irreparable injury of a grossly inadequate education and the stigma of mental retardation.

As a further result of improper placements plaintiffs and their class will be cut off from any chance to be gainfully employed and many will be forced into the further humiliation of reliance upon public assistance.

35. Unless defendants are restrained from administering unfair IQ tests in English to plaintiffs and the class of bilingual and Spanish speaking children eligible under current state law to be tested and placed in EMR classes, these children will suffer the irreparable injury of a grossly inadequate education and the stigma of mental retardation.

36. Plaintiffs and the class they represent, have no plain, adequate, speedy remedy at law to redress such injury and therefore bring this suit for declaratory and injunctive relief as their only means of securing such relief.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray that this Court enter its order and judgment:

A. Temporarily and preliminarily restraining defendants from placement of any Spanish speaking or bilingual children in classes for the mentally retarded by administration of an IQ test solely in English, pending a hearing on the matter.

B. Temporarily restraining defendants from either (1) refusing to accept the results of the 12 tests administered to plaintiffs on November 1 and 2, 1969, and the recommendations made pursuant thereto, or in the event the defendants have substantial grounds for objections to the validity of these tests (2) refusing to retest immediately the nine plaintiff children with a 12th test administered by a bilingual qualified tester armed with tests both in Spanish and English.

C. Preliminarily and permanently enjoining defendants from refusing to place plaintiffs into regular classrooms, from refusing to provide them with intensive supplemental training in language and mathematics to allow them to achieve parity with their peers as soon as possible, and from refusing to remove from their school records any and all indications that these children were or are mentally retarded or in a class for mental retards.

D. Preliminarily and permanently enjoining defendants from placing any bilingual or Spanish speaking child who scores over the ceiling for mental retardation on the "Performance" section of the Weschler (WISC) test in a class for mental retards.

E. Preliminarily enjoining defendants from refusing to retest all bilingual and Spanish speaking children currently placed in California EMR classes, from having the retests conducted by a qualified bilingual tester armed with tests in both Spanish and English, and from failing to reassign children in accordance with paragraphs C and D of this prayer.

F. Permanently enjoining defendants from placing any child in an EMR class prior to the age of 10 years and from placing any bilingual or Spanish speaking child in an EMR class unless an IQ test, standardized by culture in Spanish and English and constructed to reflect cultural values of the Mexican-American, has been administered and the child has scored below the ceiling for mental retardation as established by the test standardization.

G. Declaring, pursuant to the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations, that the current assignment of Mexican-American students to California mentally retarded classes resulting in excessive segregation of Mexican-American children into the classes is unlawful and unconstitutional and may not be justified by administration of the currently available IQ tests in English only to these bilingual and Spanish speaking school children.

H. Awarding to plaintiffs their costs of suit.

I. Granting such further relief as the Court may deem just and appropriate and retaining jurisdiction of the matter until complete relief has been effected.

Respectfully submitted,

Attorneys for Plaintiffs

16

December 18, 1969

To: Marty Glick
Denny Powell

From: Victor Ramirez
School Psychologist
Escondido, California
(714) 465-3131

This letter is to list the results of the psychological evaluation conducted on nine students from the city of Soledad on November 1 and 2, 1969.

I have been informed that the Soledad Elementary School District considers a score of two to three standard deviations (70-55 on the WISC test) as ordinarily sufficient to recommend placement in an EMR program. Regardless of the score used to make the determination, other major factors affecting these students' performances (bilingualism, cultural deprivation, and extensive time spent out of a regular program) weigh heavily in favor of reassignment of at least seven of the nine students. The other two should also be reassigned with a great deal of caution exercised to determine whether these two students can make the adjustment through intensive training to a regular program.

Each student was given the WISC test in Spanish or English. Each student was given the opportunity to respond in either language or in a combination of both languages. In addition, each child was given wide range achievement tests to measure academic progress, Peabody Picture tests (solely to determine in which language the child was most proficient), and, when indicated, a Bender Motor Gestalt. In addition, specific information about the child and his family was elicited insofar as that was possible.

1. Arthur

Verbal I.Q. 94 Performance I. Q. 86 Full-Scale I.Q. 89

Wide Range Achievement Test (Jastak 1965 Edition) - Reading Grade (Word Attack-Pronouncing Words) 1.9; Spelling Gr 1.8; Arithmetic Gr 3.2

Summary of Findings and Recommendations:

Arthur appears to be functioning with no significant difference noted between his Verbal score and Performance score. Present testing does indicated academic deficiency, especially in the reading skills area and spelling skills area, but current testing further indicates that Arthur is far more capable academically and socially than his present school placement would indicate. Arthur is capable of functioning within a regular school program and should be allowed the opportunity to succeed at that level.

EXHIBIT 8

2. Manuel

Verbal I.Q. 82 Performance I.Q. 89 Full-Scale I.Q. 84

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (pronouncing words--word attack) Level 1.
Spelling Grade Level 1.8' Arithmetic Grade Level 2.6

Summary of Findings and Recommendations:

Manuel showed no significant difference noted between his verbal score and performance score.

Present testing further indicates academic deficiencies, especially in the areas of reading and spelling skills.

Current findings do tend to indicate that Manuel is capable of functioning above his current program placement and, if given proper remedial help in some of the basic skills areas, could make an adequate adjustment to a regular program.

3. Ernest

Verbal I.Q. 71 Performance I.Q. 92 Full-Scale I.Q. 79

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (pronouncing words--word attack) Level - KG-6; Spelling Grade Level 1.2; Arithmetic Grade Level 1.8.

Bender Motor Gestalt: Test results indicate a great deal of immaturity, with some rotations, erasures.

Summary of Findings and Recommendations:

Ernest showed a significant difference of over one standard deviation noted between his verbal score and performance score.

Present testing does indicate academic deficiency, especially in the reading skills area and concentration and arithmetic reasoning.

While current testing does tend to indicate that Ernest may possibly have limited potentiality and capabilities, the rather significant disparity between his verbal score and performance score, and the particularly low depression of scores related to social integration and social knowledge tends to support the inference of cultural deprivation as a major factor affecting Ernest's school success.

4. Maria

Verbal I.Q. 74 Performance I.Q. 87 Full-Scale I.Q. 78

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (Word Attack-Pronouncing Words) 1.5;
Spelling Grade 1.6

Summary of Findings and Recommendations:

Maria showed a significant difference noted between her Verbal score and Performance score. Present testing suggests academic deficiency, especially in the reading

skills area and spelling skills area. While current
testing alone tends to indicate a possible limited
potentiality and capabilities, these results must be
evaluated with considerable caution in light of Mari
bilingual background and particularly the degree and
nature of cultural deprivation which she has undergo
as a direct result of her environment. Because of t
established fact that intelligence is not a fixed
quality but a relative quality which is heavily infl
enced by numerous variables including heredity, cult
ization, nutrition, socialization, and education, we
must therefore proceed with extreme caution in the
placement of any child into a special education prog
from such a limited background. Alternatives for me
Maria's special needs could include:

1. Adjusted school program. It is recommended t
Maria be placed in a Title I type program which is
specifically oriented to provide Compensatory Educat
to children from similar culturally deprived environ
ments. If this type of placement is not possible th
a further alternative for placement could be that of
placement into a regular program with all the object
remedial help which will be necessary to provide the
training in the academic basic skills areas which Ma
seems to need in order to meet with success.

2. Referral for outside remedial help in the bas
skills. Perhaps a public agency located nearby coul
possibly provide the type of remedial help Maria see
to need.

3. Referral for a complete vision and auditory e
It is recommended that Maria be given a vision and
auditory examination to ascertain if there are any o
possible factors which might be affecting her school
performance.

5. Ramon

Verbal I.Q. 81 Performance I.Q. 75 Full-Scale I.

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (Word Attack-Pronouncing Words) 2.3
Spelling Grade 1.8; Arithmetic Grade 3.6

Summary of Findings and Recommendations:

Ramon showed a significant difference noted betwe
the verbal score and performance score.

Present testing suggests academic retardation
especially in the reading skills area and spelling
skills area. While current testing does tend to ind
that Ramon may have somewhat limited potentiality an
capabilities, it is significant that all of Ramon's
est subtest scores are directly related to informati
and knowledge heavily influenced by the degree of so
integration that one has achieved in our culture. W
Ramon's overt behavior would lead one to believe tha
had readily assimilated our cultural pattern, the ob
disparity between his environmental background and f
tional achievement in our culture strongly indicate
possibility of other variables affecting his school
tioning than those specifically related to mental re
tardation.

6. Armando

Verbal I.Q. 77 Performance I.Q. 72 Full-Scale I.Q. 7

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (Pronouncing Words-Word Attack) PK.2;
Spelling Grade 1.2; Arithmetic Grade KG. 9

Summary of Findings:

Armando showed no significant difference noted between his verbal and performance scores. Present testi indicates severe academic deficiency in all basic skills areas. While current testing strongly suggests the possibility of limited potentiality and capabilities, there seems to be an objective compounding of the problems by the very limited environment from which Armando comes. He has developed better verbal skills than his sister.

Recommendations:

1. It is recommended that Armando be placed in a program similar to a Title I program Compensatory Education where he can gain from the added enrichment of cultural knowledge and information and receive the hel he seems to need in adjusting to our culture; but that if that type of placement is to be successful, he should be provided with the intensive remedial help he needs to meet with some degree of success in school. It may be that Armando and his sister Diane will be able to help each other by learning together the language skills which they need.

2. Armando should be carefully re-evaluated at the end of the school year so as to determine what placement may be best for him for the following school year.

7. Margaret

Verbal I.Q. 62 Performance I.Q. 83 Full-Scale I.Q. 7

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (Word Attack-Pronouncing Words) 1.7;
Spelling Grade 2.2; Arithmetic Grade 3.4

Summary of Findings and Recommendations:

Margaret showed a significant difference of over one standard deviation noted between her verbal scores and performance scores. This finding indicates problems related to the internalization of proper social and educational knowledge but the matter is complicated by Margaret's advanced age (13) in relation to the other children. It may be that her scores are limited by the rate the EMR class proceeded in meeting the needs of the younger children. She could answer more test questions correctly than most of the other children, but her score was compared with an older age group thus producing a low IQ score. There is also support for a diagnosis of limited potentiality and capabilities.

Recommendations:

1. It is therefore recommended that Margaret be placed in a Compensatory Education program to see how rapidly she can develop the needed verbal skills now found to be lacking. Integration of Margaret into a regular program should proceed with great caution and only with strong enrichment in deficient areas.

2. It is recommended that Margaret be re-evaluated at the end of the school year to ascertain what progres has been made and to determine if any future change in her program should be made.

8. Rachel

Verbal I.Q. 66 Performance I.Q. 74 Full-Scale I.Q.

Wide Range Achievement Test (Jastak 1965 Edition) -
Reading Grade (Word Attack-Pronouncing Words) 1.5;
Spelling Grade 1.2; Arithmetic Grade 2.6

Summary of Findings and Recommendations:

Rachel appears to be functioning with no significant difference noted between her verbal score and performance score. Present testing suggests academic deficiency in all academic skills areas. While current test results tend to support the possible diagnosis of mild retardation, it is significant that while Rachel's overall pattern of functioning does indicate a somewhat limited potentiality, her lowest areas are directly related to the degree of one's assimilation of social and educational information from our culture. Because of this, extreme caution must be exercised throughout Rachel's school career in order to more adequately provide the type of program she will need in order to meet with success. It is noted that family problems caused very excessive absences in the past school years which no doubt contribute to low test scores. The possibility of subsequent growth and development in assimilating our cultural, social and educational goals, and information could lead to added success in school and should always be considered in her future placement.

Recommendations:

1. It is therefore recommended that Rachel be placed in a Compensatory Education program to see how rapidly she can develop the needed verbal skills now found to be lacking. Integration of Rachel into a regular program should proceed with great caution and only with strong enrichment in deficient areas.

2. It is recommended that Rachel be re-evaluated at the end of the school year to ascertain what progress has been made and to determine if any future change in her program should be made.

Victor Ramirez
School Psychologist

Integrated Education
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SPANISH-SPEAKING PUPILS CLASSIFIED AS EDUCABLE MENTALLY RETARDED

California State Department of Education

The following was prepared for the Mexican-American Education Research Project by John T. Chandler and John Plakos. (Ed.'s note: In the past, observers have noted that educable mentally handicapped classes have been used as a 'dumping ground' for minority group children. The significance of this study is that it indicates the charge may be true.)

This report reflects the findings of an investigation conducted by the Mexican-American Education Research Project, California State Department of Education, on a sample of Mexican-American pupils enrolled in classes for the educable mentally retarded (EMR) in selected school districts in California. The investigation has been directed to the question as to whether these pupils should have been placed in classes for the educable mentally retarded or whether a language barrier prevented them from being assessed properly as to their native abilities to perform cognitive tasks.

TEST GROUP POPULATION

Two school districts located in different geographical regions were selected from which a sample pupil population was chosen for the purposes of the study reported on here. One school district was located in a rural area, and the other district was located in an urban area. In each district, the pupils selected for this investigation had to meet the following criteria: (1) be of Mexican descent; (2) be currently enrolled in EMR classes; (3) have evidenced a problem in using the English language due to their native language being Spanish.

A total of 47 pupils enrolled in grades three through eight were selected for the study; 17 were from the rural area and 30 were from the urban area.

ASSESSMENT INSTRUMENT

The assessment instrument used in this study was the *Escala de inteligencia Wechsler para ninos*, which is the Spanish version of the *Wechsler Intelligence Scale for Children*. The norms for the Spanish version were established on the basis of tests conducted in Puerto Rico, which raises some question of reliability and validity when this version is administered to children whose native tongue is a Spanish idiomatic to various regions in Mexico. Before using the *Escala de inteligencia Wechsler para niños*, certain items needed to be reworded to fit the Spanish in common use by Mexican-Americans in California.

For example, *bola* was changed to *pelota* and *concreto* was changed to *cemento*.

Also changes were considered necessary in the "allowable answers" to some items, as follows:

- *General Information* (Section 6) Number a: "In what kind of a store do we buy sugar?" One answer which should be allowed is "liquor store."
- *General Information* (Section 6) Number 14. "Where is Chile?" Allowable answers should include "in a can," "in a field," and "in a store"; otherwise the question should be eliminated, as chile in their vocabulary is not normally associated with a country.

The items noted are just a few examples of changes required to assure a reasonable level of reliability and validity when the *Escala de inteligencia Wechsler para ninos* is used on a Spanish-speaking population of Mexican descent.

TESTING PROCEDURE AND CONDITIONS

The testing procedure was arranged by working in conjunction with the director of special education in each school district and the assigned psychologist; the procedure sometimes permitted the testing of two pupils each day in their own school.

It was explained to those tested that although the test would be conducted in Spanish, English would be used when comprehension was lacking. It was soon evident that some of the pupils were not proficient in Spanish or English.

The pupils were not pressed for time to begin, nor were they rushed from one section to another. They were encouraged to relax in order to maintain rapport. At one point in the testing, two staff members attempted to make close observations of the pupils taking the test, but the pupils had difficulty concentrating; therefore, the experiment was terminated. However, by changing the

EXHIBIT C

nethod of observing the pupils, the staff members were ible to make their observations with no observable discomfort on the part of the pupils.

A study of post testing results made it possible for the nvestigators to be cognizant of post performances and o take advantage of the information obtained by local ersonnel.

ANALYSIS TECHNIQUE

he data were analyzed by using the simple comparative echnique of mean and median IQ gain — comparing revious IQ scores with those computed from the present esting with the *Escala de inteligencia Wechsler para iños*. (Note: In a few cases, when the pupil requested t and when the psychologist approved it, the English ersion of the WISC was used instead of the Spanish veron.) Each pupil's point difference was charted for the ections on verbal tests, performance tests, and total attery score.

TEST RESULTS

he results of the testing of the pupils in the two districts (ural and urban) showed that the average (mean gain etween the prior test scores and the present test scores vas 13.15 IQ points (the prior IQ mean being 68.61 and he present IQ mean being 81.76). The mean IQ point ifference between the prior scores and the present cores was +12.45 points, which indicates a significant ain in the overall point score, thus exceeding chance.

he median score for the prior IQ was 70, while the nedian score for the present IQ was 83, an increase of 13 IQ points.

he results also showed that of the 47 pupils tested, 27 cored IQ ratings of 80 or over, and 37 had IQ ratings of 75 or above.

Table 1 (rural) and Table 2 (urban) indicate the individual patterns of point differences noted in the prior test scores and the present test scores.

The data in Table 2 clearly show the discrepancies between the IQs secured by using the English version of the WISC as opposed to those secured by using the Spanish version. Taking into account the distrust of the IQ as a sole basis for making a judgment, there is yet the fact that point variance, mean, and median IQ differences are all at a 12-point level and indicate a modal cluster in this area.

Some pupils' gains were minimal, and one pupil (number 20) had a -5 point difference. However, the high mean and median IQ gain in points is indicative of the need to assess the placement of Mexican-American pupils in EMR classes when the placement is based solely on their inability to function in what is to them a foreign language, particularly when tested in the "foreign language." Another factor which must be analyzed when considering the placement of such pupils is that some have spent as long as three years in a "special" class and as such may not have received the same advantages as pupils with comparable IQs in regular classes; the "special" placement may have been a retarding influence.

CONCLUSION

The results of this investigation indicate that many Mexican-American pupils may have been placed in EMR classes solely on the basis of performance on an invalid IQ test. The test is termed invalid because this particular subpopulation of pupils lacks a facility and understanding of the English language; therefore, when tested in English, they cannot perform well. However, this investigation has shown that when these pupils are given the oppor-

Table 1

Comparison of WISC Test Scores Made by Selected Mexican-American Pupils Enrolled in a School District Located in a Rural Area of California

Pupil number	Verbal IQ		Point diff	Performance IQ		Point diff	Total Scores		Point diff
	Prior	Present		Prior	Present		Prior	Present	
1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
7	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
8	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
9	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
10	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
11	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
12	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
13	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
14	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
15	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
16	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
17	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Table 2

Comparison of WISC Test Scores Made by Selected Mexican-American Pupils Enrolled in a School District Located in an Urban Area of California

Pupil number	Verbal IQ		Point diff	Performance IQ		Point diff	Total Scores		Point diff
	Prior	Present		Prior	Present		Prior	Present	
18	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
19	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
20	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
21	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
22	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
23	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
24	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
25	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
26	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
27	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
28	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
29	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
30	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
31	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
32	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
33	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
34	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
35	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
36	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
37	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
38	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
39	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
40	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
41	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
42	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
43	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
44	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
45	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
46	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
47	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

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tunity to perform in the language with which they are most familiar and comfortable — usually Spanish — their performance in many cases is above the cut-off level of the educable mentally retarded category (approximate IQ of 75).

RECOMMENDATIONS

In reference to the findings of this investigation, the following recommendations are made:

- School district personnel should review the cases of

  Spanish surnamed pupils currently enrolled in EMR classes; those pupils who appear to have difficulty in using the English language because Spanish is their native language should be retested with the Spanish version of the WISC.

- Special personnel should be enlisted to assist the school psychologist in testing pupils who have a language barrier.

- A formal request should be made of the testing corporation to make certain changes in the Spanish version of the WISC.

- A "transition" program should be provided for pupils who need special instruction in the use of the English language. Such a program might include English-as-a-second-language (ESL) instruction and bilingual instruction in the basic subjects.

- Long-range plans should be made to improve the present methods and instruments used for assessing pupils prior to referral to EMR classes, particularly those pupils with a cultural and linguistic background different from most of the English-speaking pupils.

APPENDIX

SAMPLE EXCERPTS FROM THE PREVIOUS RECORDS OF SELECTED PUPILS AND THEIR SCORES FROM PRESENT INVESTIGATION

Pupil Number 1

This pupil was born in Mexico but was brought to the USA when he was about six months old. The usual language of the home is Spanish; his stepmother speaks no English.

The pupil is hereby certified as eligible for the EMR program. His inability to fulfill the demands of the regular class has apparently been excessively stressful to him.

Recommendation in previous record: Pupil should be placed in the program for educable mentally retarded as soon as practicable, and he should not be required to attend regular classes pending such placement.

Findings from present investigation: Total IQ score for pupil 1 is 87; verbal IQ, 79; performance IQ, 99.

Pupil Number 4

This pupil comes from a fairly large Mexican-American family. She has six brothers and one sister. Spanish is the only language used in the home. Parents work as farm laborers. The family typically "visits" in Mexico during winter months, at which time the children do not attend school.

The pupil was retained in the first grade and continues to have learning problems. The pupil's test results indicate that she is functioning at the borderline level in mental abilities. Her true intellectual potential is probably significantly higher than her test performance suggests. However, she lacks many of the skills necessary to function satisfactorily in a regular classroom at this time.

Recommendation in previous record: The pupil should be considered for placement in the EMR program.

Findings from present investigation: Total IQ score for pupil 4 is 84; verbal IQ, 86; and performance IQ, 85.

Pupil Number 5

This pupil is a large, somewhat obese girl of Mexican-American background. She lives with her parents, one brother, and two sisters. Her father is a farm laborer, and Spanish is the language spoken in the home.

Test results indicate that she is currently functioning intellectually at the borderline retarded level. On the performance scale of the WISC, she scored substantially below average on all of the subtests except object assembly, which is one test, according to Wechsler, on which mentally retarded individuals frequently obtain average scores.

Recommendation in previous record: This pupil should be considered for placement on a trial basis in the EMR program.

Findings from present investigation: Total IQ score for pupil 5 is 98; verbal IQ, 85; and performance IQ, 113.

Pupil Number 16

This pupil is pleasant, friendly, and vigorous. While his test scores overall indicate retarded functions slightly higher capabilities are indicated in some areas.

On the basis of his total showing, however, it is felt that he is an appropriate candidate for the educable mentally retarded classes. Behavior disturbances noted by the teacher seem to be reasonable responses to genuine frustration; a special class setting should contribute much to stabilizing this behavior.

Recommendation in previous record: This pupil is an appropriate candidate for EMR classes.

Findings from present investigation: Total IQ score for pupil 16 is 80; verbal IQ, 90; and performance IQ, 72.

AFFIDAVIT OF CRUZ REYNOSO

STATE OF CALIFORNIA)
) SS.
COUNTY OF SAN FRANCISCO)

I, CRUZ REYNOSO, being duly sworn, hereby depose and say:

I am the Executive Director of California Rural Legal Assistance and a member of the State Bar of California. On December 15, 1969, attorneys Martin Glick, Maurice Jourdane, and I met with Soledad Elementary School Superintendent Wendell Broom to review the facts we had uncovered in our investigation of placement of Mexican-American school children in classes for mentally retarded in Soledad and throughout the State of California. All of the allegations in the complaint filed in this action were discussed with Mr. Broom -- including (1) the high IQ scores on the retest, (2) the statewide pattern of discriminatory placement of the Spanish-speaking in classes with mental retards, and (3) the great harm being caused and urgency of quick action were discussed with him. Two days thereafter complete copies of the test results and recommendations obtained by bilingual psychologist, Victor Ramirez, were provided to the Superintendent.

Mr. Broom asserted that he had previously suspected that unfair testing of Mexican-Americans had occurred because they were tested in English. He unequivocally assured us that he could reassign the children immediately after Christmas vacation to regular classes and that he could use existing facilities for high powered supplementary training in language and mathematics to correct past deficiencies caused by their improper placement so that the children would be fully integrated into the normal program as quickly as possible. Mr. Broom stated that the Christmas vacation provided the most opportune time for this transition as the school would devise a schedule during this period and the children in the school would accept the change as a natural one. He further assured plaintiffs that the tests already administered to the children would be sufficient so long as the psychologist who administered them was certified by the State of California.

On December 30, 1969, 15 days after school officials had promised to reassign the children, an agent of the school district sent a letter to plaintiffs changing the school's position, indicating that a "complete study" would be necessary, and asking for further documentation. In spite of plaintiffs' warnings, in response, that any further delay in providing the children with a regular education would endanger their chances to make up for the three years of deprivation already suffered, the children upon return from Christmas vacation on January 5, 1970, were and are presently forced to stay in the class for mental retards.

CRUZ REYNOSO

Subscribed and sworn to before me
this ______ day of January, 1970.

NOTARY PUBLIC in and for the County
of San Francisco, State of California

1. C.

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Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DIANA MARTINEZ, et. al.,
Plaintiffs,
vs.
STATE BOARD OF EDUCATION, et. al.,
Defendants.

No.

POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

I. FACTUAL BACKGROUND

The facts, simply stated, are

A. California's Mexican-American school children are currently being segregated into classes for the mentally retarded. While 3 of every 100 Mexican-Americans are assigned to these classes only 1 1/3 of every 100 other whites is so assigned. [It is considered statistically impossible that this could occur by chance -- odds exceed 1 in 100 billion].

B. This discriminatory assignment occurs because IQ tests are given to Mexican-Americans in English by testers who cannot speak Spanish and becuase the tests given are culturally biased against the Mexican-American. When retested, 7 of the 9 named plaintiffs scored higher than the maximum score used by the county as a ceiling for mental retards. They averaged 15 point higher than earlier scores. The State of California's own random survey (attached to the Complaint as Exhibit C) showed 42 of 47 children scoring higher than the cutoff.

C. This discriminatory assignment has a devastating effect tantamount to a life sentence of illiteracy and public dependency and a permanent stigma of inferiority. Very little is learned in most EMR classes as expectation is low, and the curriculum is severely limited.

II. PLAINTIFFS AND THE CLASS THEY REPRESENT ARE BEING DEPRIVED OF THEIR FUNDAMENTAL RIGHT TO RECEIVE AN EDUCATION AND THEIR RIGHT TO AN EQUAL EDUCATION.

The right to receive an education, and its fundamental value, was explicitly defined by the United States Supreme Court in Brown v. Board of Education of Topeka, 347 U.S. 483, 493, 74 S. Ct 686 (1954), when it declared:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendence laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child many reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (emphasis added)

Pursuant to the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000d-1), regulations were published in the Federal Register on March 23, 1968, p. 4950, Vol. 33, No. 58. These regulations provide that "each school system has an affirmative duty to take prompt and effective action to eliminate...discrimination based on...national origin, and to correct the effects of past discrimination [Section 6]. The regulations further require equal opportunity in available classes, curricula, school activities, teachers, facilities, and text books.

In addition to federal requirements, the right of every child to an equal education is fundamental in California. Art. 9 Para. 5

of the California Constitution states that: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year..." Pursuant thereto, Education Code Para. 1051 and Para. 5011 place the duty to maintain schools and classes on the governing board of the school districts and Para. 1054 and Para. 5015 require the school boards, insofar as possible, to maintain their schools "with equal rights and privileges."

California cases have fully upheld the validity of the State's statutory and administrative requirements of equal education. In Jackson v. Pasadena City School District, 59 Cal. 2d 876, 31 Cal. Rptr. 606 (1963), the California Supreme Court reviewed a change in a school district zoning plan. In that case the Pasadena City School District assigned a group of white junior high students to a predominently white school instead of to a school of predominently minority students which was "in the main" situated closer to the group of students assigned. The California court first described the role of education, and the "retarding" effects of unequal education in similar terms to those repeatedly enunciated by the United States Supreme Court:

> In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the State must be made available to all on an equal basis. Because of intangible considerations related to the ability to learn and exchange views with other students, segregated professional schools have been held not to provide equal educational opportunities, and such considerations apply with added force to children in grade and high schools. The separation of children from others of similar age and qualifications solely because of race may produce a feeling of inferiority which can never be removed and which has a tendency to retard their motivation to learn and their mental development. (Id. at p. 609)

The court rejected the school district's argument that complete or almost complete segregation was required before the court could take action. ["Improper discrimination may exist notwithstanding attendance by somewhite children at a predominently Negro school..." Id. at p. 609] and went on to point out that California school officials have an affirmative duty to prevent racial or ethnic imbalance[1]:

> ...[I]t is not enough for a school board to refrain from affirmative discriminatory conduct...The right to and equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools, regardless of its cause... Id. at p. 610

It does not require elaboration to point out that defendants fail to provide to plaintiffs their right to an education, let alone their right to an equal education, when they segregate these children along with other Mexican-Americans, into classes aimed only at making mentally deficient children "economically useful and socially adjusted." [Education Code Para. 6902].

III. PLAINTIFFS ARE SUFFERING CONTINUING GREAT AND IRREPARABLE INJURY

The named plaintiffs and their counterparts currently in classes for the mentally retarded across California fall academically further and further behind their peers with each day that passes. In spite of the statewide studies that have been conducted and are set out in the complaint, defendants at the state level and local level have at best procrastinated and at worst simply ignored the evidence of segregation and the reports that children with normal learning abilities are being ruined by a school system which condemns them to illiteracy. It is difficult to understand the justification for a measurement of intelligence which blindly poses questions in English to a child who doesn't speak that language. The application for a temporary restraining order asks only that defendants immediately accept the test results and recommendations obtained by the qualified, credentialed bilingual psychologist and reassign the children in accordance with those recommendations or, alternatively, if the

---

1) The fact that the present case involves segregated classes within the same school building whereas Jackson v. Pasadena City School District involved segregation in separate schools is a distinction without any legal significance. See Balling v. Sharpe, 347 U.S. 497 (1954).

school district has some substantial reason to discredit the psychologist, hitherto unmentioned, to institute immediately the process of retesting the children with tests administered by a bilingual psychologist. 2) This is the minimum essential to prevent further irreparable injury to these children and to begin the road to removal of the stigma of retardation and inferiority and to an opportunity for a normal and productive life.

Dated January 7, 1970.

Respectfully submitted,

DENNIS POWELL
MAURICE JOURDANE
MARTIN GLICK

By________________________
MARTIN GLICK

---

2) The temporary restraining order also preserves the status quo as to other bilingual children who are threatened with I.Q. testing in English and placement in an EMR class before a hearing on a preliminary injunction can be held.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DIANA, et al.,

Plaintiffs,

vs.

STATE BOARD OF EDUCATION, et al.,

Defendants.

C-70 37 RFP

STIPULATION AND ORDER

STIPULATION

The parties hereto hereby stipulate that, without either party relinquishing or abandoning its position in regard to the merits of this action, the attached agreement, hereby fully incorporated by reference herein, upon implementation, will resolve the controversy presented to the Court in this action. The parties, therefore, mutually request this Court to enter an Order, pursuant to the Federal Rules of Civil procedure, approving and adopting as its Order, the stipulated agreement of the parties.

Dated: ________

____
Attorney for Plaintiff

____
Attorney for Defendant

IT IS SO ORDERED

Date: ____________

____
United States District Judge

1 a

AGREEMENT

THE PARTIES AGREE AS FOLLOWS:

1. The State Department of Education will mail, with the new regulations 3401, et seq., Exhibit "A", a letter to every school district within the State of California, which includes the paragraphs attached in Exhibit "B". Both exhibits are incorporated fully by reference herein as part of this agreement.

2. The State Department of Education in implementing Section 2011(b) of Title 5 of the California Administrative Code shall require districts to get statistics sufficient to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in each Educable Mentally Retarded class in the district. In the event that the State Department of Education determines that there is a significant variance in racial or ethnic makeup between its EMR classes and the total enrollment of students in the district, the district shall submit an explanation of the variance.

3. The Department of Education will make available for inspection all reports received pursuant to paragraphs 1 and 2.

4. The State Department of Education is undertaking to arrange norming procedures for an individual intelligence test wherein the population will be comprised of Mexican-Americans who live in California. Such undertaking is contingent upon the State Department of Education receiving funds for said work and the approval of the publisher of such test. The state will make the test available to plaintiff's attorneys after standardization and item analysis. Plaintiff's attorneys will provide to defendants, in writing, a signed statement setting forth the names of all consultants who will review the test. All such consultants shall be competent psychologists holding credentials issued by the State Board of Education authorizing the giving of individual examinations under Education Code Section 6908.

Such psychologists may also consult with State Department of Education employees, at a time convenient to such psychologist and the State Department of Education, prior to the actual norming of such test. At said time the State Department of Ed cation will make its work to date available to said psychologi for their review. Such review is contingent on approval of th publisher of the test. The State Department of Education will exert every effort to obtain the publisher's approval. Said psychologists shall not publicly comment on the State Departme of Education's work or efforts in connection with the test pri to the actual norming of the test.

5. The plaintiffs agree that upon approval and adoptio of this agreement by the Court as its Order and upon implement tion thereof, including resolution of contingencies in Paragra 4 of this agreement in a manner which results in development o an individual intelligence test as provided in that paragraph in review of the test prior to standardization by plaintiffs, this action will be terminated.

Dated: ________________

ATTORNEYS FOR PLAINTIFFS　　ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS　　ATTORNEYS FOR DEFENDANTS

Main Points of Court Order and Agreement
In Diana v. State Board of Education

1) All children whose primary home language is other than English (e.g. Spanish, Chinese, etc.) from now on mus be tested in both their primary language and in English.

2) They may be tested only with tests or sections of tests that don't depend on such things as vocabulary, gene information ("Who wrote Romeo and Juliet?"), and other sim unfair verbal questions.

3) Mexican-American and Chinese children already in classes for mentally retarded must be retested in their primary language (unless they were previously tested in it and must be reevaluated only as to their achievement on non-verbal tests or sections of tests.

4) Each school district is to submit to the state in time for next school year a summary of retesting and reeva uation and a plan listing special supplemental individual ing which will be provided to help each child back into re school classes

5) State psychologists are to work on norming a new or revised IQ test to reflect Mexican-American culture. Th test will be normed by giving it only to California Mexica Americans so that in the future Mexican-American children tested will be judged only by how they compare to the perfo mance of their peers, not the population as a whole.

6) Any school district which has a significant dispar between the percentage of Mexican-American students in its regular classes and in its classes for the retarded must submit an explanation setting out the reasons for this disp

2.

SPECIAL EDUCATION

Race, Language, National Origin Discrimination and Due Proce

Covarrubias v. *San Diego Unified School District*, C.A. No. 70-394-T
Cal.). Papers available at Clearinghouse (#7427).

Guadalupe Organization v. *Tempe Elementary School District No. 3*, No
71-435 Phx. (D. Ariz.). Papers available at Clearinghouse (#6312).

II C. Special Education & Testing: Race Discrimination & Due Process

1.
1.a

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In the United States District Court for the

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Plaintiffs,

vs.

WILSON RILES, Superintendent of Public Instruction for the State of California; HENRY P. GUNDERSON; MRS. JEANETTE RITCHIE; THOMAS HOWARD; EUGENE RAGLE; MRS. DONALD P. KROTZ; CLAY MITCHELL; TONY SIERRA; REV. DONN MOOMAH; MAX RAFFERTY; JOHN R. FORD; MRS. CAROL STAFFORD and WOLF OGLESBY, as the Members of the State Board of Education; THOMAS SHAHEEN, Superintendent of Schools for the San Francisco Unified School District; DR. ZURETTI GOOSBY; DAVID SANCHEZ; JOHN CROWLEY; MRS. ERNEST LILIENTHAL; HOWARD NEMEROVSKI; ALAN NICHOLS and LAUREL GLASS, as Members of the Board of Education of the San Francisco Unified School District,

Defendants.

Civil No. [illegible]

SUIT FOR VIOLATION OF CIVIL RIGHTS AND FOR INJUNCTIVE AND DECLARATORY RELIEF

I. JURISDICTION

1. This action arises under the Constitution and laws of the United States, including the Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964 [42 U.S.C. 2000(d), 2000(d)(1)]. It also arises under the Constitution and laws of the State of California, including Art. 9 section 5 of the Constitution, Education Code sections 1051, 1054, 5011 and 5015 [equal educational opportunities], and Education Code sections 6901, et seq. [education of mentally retarded minors]. A declaration of rights is sought under the Declaratory Judgment Act, 28 U.S.C. section 2201. Jurisdiction of this Court is invoked under Title 28 U.S.C. sections 1331, 1337 and 1343 and Title 42 U.S.C. sections 1981 and 1983. The amount in controversy herein exceeds the sum of $10,000 exclusive of interest and costs.

PLAINTIFFS

2. The group listed above in the caption as plaintiffs is composed entirely of black elementary school children with their parents as representatives. All of the plaintiffs attend elementary schools which are in the San Francisco Unified School District, and all have been inappropriately classified and placed in classes for the mentally retarded (hereinafter EMR classes) and are being wrongfully retained in such classes. They represent the class of black children in California wrongly placed and retained in classes for the mentally retarded. Plaintiffs come from families in which the primary culture is contemporary black american culture. Plaintiffs' spoken language and communication skills reflect such variations and differences from so-called Standard English as is consistent with their cultural background.

IMPROPER PLACEMENT OF PLAINTIFFS

3. Plaintiffs are not now and never have been mentally

retarded. At least one of them is probably above average in intelligence. They are the victims of a testing procedure which fails to recognize their unfamiliarity with the white middle-class cultural background and which ignores the learning experiences which they may have had in their homes. Plaintiffs have been subjected at various times in the past to a variety of so-called intelligence (I.Q.) tests which place a heavy emphasis on verbal skills and which fails to properly account for plaintiffs' home experience or environment. Such tests were approved by the State Department of Education and administered by the San Francisco Unified School District and by other school districts throughout the state in the normal course of conducting school business and were the primary basis for placing plaintiffs and many other black school children in classes for the mentally retarded.

4. It is well documented that I.Q. score is a highly untrustworthy measure of the learning ability of children from ethnic minority groups. Seymour Sarason, Thomas Gladwin and Richard Masland, Mental Subnormality (1958); W.S. Neff. "Socio-economic Status and Intelligence: A Critical Survey," Psychological Bulletin, XXXV (1938); Rodger Hurley, Poverty and Mental Retardation--A Causal Relationship, (1969); Allison Davis and Kenneth Eells, Davis-Eells Test of General Intelligence (1958). These are just a few of the treatises on the subject. A recent study by Dr. Jane Mercer, "The Use and Misuse of Labelling Human Beings: The Ethics of Testing, Tracking and Filing," (1971) showed that 90 per cent of black children classified as "mentally retarded" are at least normal in social behavior, in their ability to hold steady jobs and to lead normal lives as adults. (See also affidavit of Jane Mercer attached hereto as Exhibit "A," and incorporated herein by this reference.)

5. The above-referenced I.Q. tests related to subject-

matter solely in the dominant culture, and were established principally by testing members of that culture. The Stanford-Binet Test for example was standardized in 1937 by giving the test to 3,134 subjects, all of whom were white, native-born Americans. The test was partially restandardized in 1960, but the restandardization again did not take into account ethnic group differences.

The Wechsler Intelligence Scale for Children which was administered to plaintiffs by defendant school district, was constructed in 1950 by testing 2,200 persons; again only Anglo-American children were tested. There has been no restandardization. Such tests obviously do not properly assess the abilities of black children, and are therefore a wholly improper basis upon which to make a decision that these children should be put in EMR classes.

CLASSES FOR MENTALLY RETARDED

6. The State of California authorizes these classes for mentally retarded children under sections 6901, et seq. of the Education Code. These classes provide children minimal training in reading, spelling and math. They also teach children body care and cleanliness, how to slice meat, how to fold a piece of paper diagonally, and how to chew and swallow food. Section 6902 of the California Education Code states that such class should be designed "to make them [the children] economically useful and socially adjusted."

7. Improper placement in one of these classes can be tantamount to a life sentence of illiteracy and public dependency. The stigma that attaches from such placement causes ridicule from other children and produces a profound sense of inferiority and shame in the child. It is therefore of paramount importance that no children be placed in such a class unless it is clear beyond reasonable doubt that he suffers from an impairment of ability to learn.

INDEPENDENT RETESTING OF PLAINTIFFS

8. Between October 1970, and March 1971, plaintiffs were independently retested by members of the Bay Area Association of Balck Psychologists, who are fully qualified to administer such tests. These psychologists are from the same cultural background as plaintiffs and utilized certain psychological techniques designed to account for the cultural experience of plaintiffs. On retesting plaintiffs' scores ranged from 79 to 104, every one of them above the maximum score (75 in the San Francisco Unified School District) set by defendants as a ceiling for placement in EMR classes. In fact, plaintiffs achieved "full scale" (combined verbal and performance) I.Q. scores ranging from 17 to 38 points higher than they received when tested by school psychologists. This retesting clearly indicates the impact which cultural factors, choice of language and rapport with the tester have upon plaintiffs' ability to perform well on the tests. The retesting also points out the invalidity of testing procedures used by defendants in screening, evaluating and placing black children in such classes. (See affidavits from the psychologists who performed the tests, attached hereto as Exhibit "B," and incorporated herein by this reference.)

DEFENDANTS

9. Defendant Wilson Riles is the Superintendent of Public Instruction for the State of California and in said capacity is responsible for administration of all school programs, including classes for the mentally retarded. Defendants Henry P. Gunderson, Mrs. Jeanette Ritchie, Thomas Howard, Eugene Ragle, Mrs. Donald P. Krotz, Clay Mitchell, Tony Sierra, Rev. Donn Moomah, John R. Ford, Mrs. Carol Stafford and Wolf Oglesby are the members of the State Board of Education, and thus are empowered to issue regulations relating to placement in California EMR classes. Defendant Thomas Shaheen is the

Superintendent of Schools for the San Francisco Unified School District. Defendants Dr. Zuretti Goosby, Dr. David Sanchez, John Crowley, Mrs. Ernest Lilienthal, Howard Nemerovski, Alan Nichols and Dr. Laurel Glass are members of the Board of Education of the San Francisco Unified School District and are responsible for the policies and operations of the San Francisco public schools.

DEFENDANTS OWN STATISTICS SHOW THE INAPPROPRIATE SEGREGATION OF BLACK CHILDREN IN CLASSES FOR THE RETARDED

10. Defendants' own statistics demonstrate graphically the invalidity and illegality of their methods of screening, evaluating and placing plaintiffs and other black children into EMR programs. The most recent statistics available in the Special Education office of the San Francisco Unified School District indicate that more than 60 per cent of all children in the EMR program are black with the greatest disparity at the elementary level. (66 per cent black). By contrast the proportion of black children in the school district is only 28.5 per cent. (See, Selected Data for Study in the challenge to Effect a better Racial Balance in the San Francisco Public Schools, San Francisco Unified School District, 1970-1, attached hereto as Exhbiit "C" and incorporated herein by this reference).

11. The statewide figures show even a greater discrepancy. Although blacks comprise only 9.1 per cent of school children in California, they represent 27.5 per cent of children in programs for the mentally retarded. (See, Bureau of Intergroup Relations, State Department of Education,

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Racial and Ethnic Survey of California Public Schools, Fall 1970, attached hereto as Exhibit "D" and incorporated herein by this reference).

12. Plaintiffs and other black school children in California's elementary schools are not less intelligent than their white, Anglo-Saxon counterparts. Therefore, the conclusion from this highly disproportionate state of affairs is inescapable: defendants by their improper methods of evaluation and placement have caused a statewide segregation of black school children in classes for the retarded.

PLAINTIFFS' RIGHT TO AN EQUAL EDUCATION

13. The right of every child to an equal education is fundamental in California. Article 9, Section 5 of the California Constitution states in part:

> "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year..."

Pursuant thereto, the provisions of the Education Code of the State of California places the duty to maintain schools and classes on the governing board of the local school districts (Section 5011) and the said Code further requires that School Boards insofar as possible maintain their schools "with equal rights and privileges." (Section 5015)

14. In addition, the Civil Rights Act of 1871 (42 U.S.C. §§ 1981 and 1983) provides in part for legal action to accrue both in law and in equity for any person against whom any action has been taken under color of state law which is discriminatory in nature based upon race or color. The Civil Rights Act of 1964 provides for the establishment of certain regulations, which were in fact published in the

Federal Register on March 23, 1968, page 4950, Volume 33, No. 58. These regulations provide that "each school district has an affirmative duty to take prompt and effective action to eliminate...discrimination based upon...race or national origin, and to correct the effects of past discrimination" (section 6). The regulations further require equal opportunity in available classes, curricula, school activities, teachers, facilities and text books. The Civil Rights Act and the Regulations published thereunder reaffirm Federal policy under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to require of all the States equal educational opportunity for all citizens regardless of race or color.

INADEQUACIES OF PRESENT PROCEDURES AS RECENTLY MODIFIED

15. The Legislature has recognized the severity of the discrimination complained of here. In Senate Bill 33 which became effective on October 1, 1971, the State Legislature declared a primary interest in equality of educational opportunity and asserted that pupils should not be assigned to special programs for the mentally retarded if they can be served in regular classes. The Legislature explicitly condemned the disproportionate enrollment of minority students in such classes and the intelligence tests which underestimate the academic ability of such pupils. (See, S.B. 33, Sec. 1, as it amends Education Code section 6902.06, attached hereto as Exhibit "E" and incorporated herein by this reference) A Special Education Memorandum was issued by the State Department of Education on August 31, 1971 to implement the statement of legislative purpose. (Said Memorandum is attached hereto as Exhibit "F" and incorporated herein by this reference).

16. Although Senate Bill 33 and the regulation issued by defendants pursuant thereto make some modification of current procedures utilized in EMR placement, neither provides an adequate means to eliminate discrimination and error in such placement, and neither is an adequate remedy for plaintiffs herein.

17. Defendant Wilson Riles has been quoted as calling for an end to statewide standardized testing in California's public schools and has described the tests as having "absolutely no use whatsoever." (See Exhibit "G" attached hereto and incorporated herein by this reference). Nonetheless, the biased tests which have created the current bias and error and which have wrongfully placed far too many minority students in classes for the mentally retarded are still in use. (Exhibit "F," pp. 2-5).

18. A complete psychological examination is still required before any child may be placed in a class for the mentally retarded, and such examination has now been revised to "include estimates of adaptive behavior" which would apparently account for cultural differences to some extent. Yet no guidelines or standards are provided for evaluating or weighing the results of an adaptive behavior test, as against the results of the culturally biased standardized test. Presumably, then, a child who performs fairly well on an adaptive behavior scale might still be considered "retarded" if that conclusion is indicated by the culturally biased standardized test. (Exhibit "F," pp. 4-6).

19. Defendants continue to make no meaningful efforts to insure that a psychological assessment is conducted and interpreted by a person adequately prepared to evaluate cultural factors, preferably a person of similar ethnic background as the child being evaluated. On information and belief,

the San Francisco Unified School District employs approximately 40 psychologists and psychometrists of whom only one is black. Furthermore, no attempt is made to require in-service training of current personnel involved in such evaluation or placement; nor to promote participation by minority persons in preparation or selection of the tests to be used.

20. Defendants continue to permit the test results to be placed in the child's permanent school record and to be reported to classroom teachers and other faculty or administrators on the school site. Individual children may still be identified and categorized by results of culturally biased standardized tests.

21. Education Code section 6902.095 now requires a written explanation "if the percentage of children from any minority ethnic group in such classes varies by 15 per cent or more from the percentage of such children in the district as a whole." (S.B. 33 § 5). Not only is this a highly inadequate safeguard, but no enforceable remedies are provided (Exhibit "F," pp. 8-9). The suggested quota would, for example, permit a district where 10 percent of the elementary children are black to have up to 25 per cent black children in classes for the mentally retarded, i.e., two and a half times their representation in the district as a whole, or something quite akin to the current disparity. Moreover, the smaller the ethnic group's representation in the district, the greater the allowable disparity. And the "remedy" if such a continuing disparity is reported is merely that further investigation may follow.

22. Perhaps most significant is the total absence of any relief for plaintiffs and other black elementary school children who have been inappropriately placed in such classes and who are still there. Despite the legislative declaration that "This is an urgency statute necessary for the immediate

preservation of the public peace, health or safety", (S.B. 33, Sec. 8) such students may not receive a complete re-evaluation before 1974. Despite defendants' recognition of the past inequities and discrimination in the testing procedures, the Department of Education guidelines continue to require a complete re-evaluation of minors currently in EMR classes only every three years. (Exhibit "F" pp. 10-11).

CLASS ACTION

23. This is a proper class action within Rule 23 of the Federal Rules of Civil Procedure. Plaintiff children represent themselves and all other black pupils in the San Francisco Unified School District and in the State of California who have been or will be wrongfully placed or wrongfully retained in classes for the mentally retarded. Such other students are so numerous as to make it impractical to join them all in this action. The subject matter of this action is of vital interest to all such pupils because it deals directly with the quality and with the equality of education and with the fairness of the procedure used in placing black children in EMR classes and in retaining them there. The above named plaintiffs will fairly and adequately represent the community interests of the class; these plaintiffs have no interest which conflicts with the interests of the other members of said class; and plaintiffs' claims are typical of those of other class members. There are common questions of law and fact which affect the rights of minor plaintiffs herein as well as the rights of all of the other members of the class.

NECESSITY FOR RELIEF

24. The continuing and wrongful segregation of black children in programs for the retarded, when in fact they are not retarded, constitutes unlawful racial discrimination against such children. Retention of plaintiffs in EMR classes

for up to three more years will inevitably result in their being cut off from social and economic gains available to children in regular school classes, and many will be forced into the further humiliation of reliance upon public assistance. Retention of plaintiffs will add to the psychological harm and stigmatization caused by their previous wrongful placement and retention.

It is therefore imperative and vital to plaintiffs and to members of the class they represent economically, socially, psychologically and spiritually that those who have been improperly placed in EMR classes be removed immediately and that all possible measures be undertaken to minimize the damage already done.

25. Continued and wrongful retention of plaintiffs and other black children in the EMR program causes irreparable injury:

a. There are notations on plaintiffs permanent school records maintained by defendants to the effect that plaint are mentally retarded and have been placed in special rotation EMR classes. Plaintiffs are informed and believe these records are available to future teachers and faculty advisors as plaintiffs progress through school, to governmental authorities, including recruiting offices for the various armed forces officer programs, and even to employers. The stigma attached to placement and retention in EMR programs in the eyes of such persons reviewing plaintiffs' records is such as to virtually make objective evaluation of plaintiffs' accomplishments and potential impossible. This is particularly true of institutions of higher learning, such as colleges and universities, that place great importance on prior school achievement in determining suitability for entrance.

b. The gap between plaintiffs' rate of learning and achievement and that of their white Anglo-Saxon competitors are in regular school classes is an ever-widening one, due the drastically decelerated pace of experience and learning which takes place in the EMR classes. Thus, whatever difficulties plaintiffs had with school prior to being placed in EMR classes by reason of cultural difference or economic disadvantage are exacerbated by reason of plaintiffs being left in the EMR classes.

c. Plaintiffs have been confronted with taunts a derision by other children in and out of school by reason o their being wrongfully placed in EMR classes and have come t feel and will continue to feel as long as they are retained such classes a profound sense of guilt and shame over being considered second-rate and inferior in their mental abilitie achievements and learning. This makes their adjustment to l and to school and to their role as so-called slow learners m difficult and introduces psychological problems into their already problem-laden experience.

d. The stigma attached to the EMR notations on plaintiffs' records and the widening gap in actual learning bine to effectively deny plaintiffs any practical chance to realize their potential in college, in armed forces' office programs, in executive or management programs, or in variou other areas of society through which members of minority ra groups have sought and been able to lift their standards socially and economically and to share part of the American dream of self-realization and self-help to a better life.

e. The realization by plaintiffs that they are being categorized as mentally deficient and retarded, as emphasized by their retention in EMR classes, is and will inevitably lead to a loss of faith and a loss of hope, and wi consign them to dependency on welfare and an inability to e or train themselves to do more than menial labor at low wages for their entire productive lives.

f. Plaintiffs, by reason of all of the factors listed above, among others, will be less able to obtain employment at levels of compensation commensurate with their white peers, and will spend their entire productive lives working at menial tasks at lower rates of pay than their white peers, to the end that plaintiffs, their families, and the members of the class they represent will be greatly damaged economically over their productive lives.

26. Unless plaintiffs are immediately removed from EMR classes, placed in regular classes, given intensive individual instruction, tutoring, and help in regaining the ground lost while wrongfully in the EMR program, they will be damaged beyond saving in terms of their educational opportunity.

27. In addition, unless defendants are restrained from continuing to administer unfair, unlawful and improper I.Q. tests which discriminate against plaintiffs and others in their class and to use the same as an important basis for placement and retention of black children in the EMR program, plaintiffs and others of their class will continue to suffer the irreparable harm of a grossly inadequate and discriminatory education and the stigma of mental retardation.

28. Plaintiffs and the class that they represent have no adequate, plain and speedy remedy at law to redress suc injuries and therefore bring this suit for declaratory and injunctive relief as their only means of securing such relief.

29. An actual controversy exists herein, in that plaintiffs claim that they were illegally and wrongfully placed in said EMR classes in the beginning and are being illegally and wrongfully retained there as are all members of their class whereas, defendants claim and allege that its conduct was prope

Plaintiffs seek a declaration of the legal rights and duti involved in the subject controversy.

30. Plaintiffs have exhausted all administrati remedies available to them. Lengthy negotiations with the San Francisco Unified School District culminated in a reso adopted by the San Francisco Board of Education in June, 1 but state requirements and restrictions and defendants' fa to implement said resolution have precluded any meaningful modification of the discriminatory situation. Similarly, series of meetings during 1970 and an exchange of letters through April, 1971 with State Department of Education fai to produce an effective remedy. Only after careful study Senate Bill 33 and the State Department of Education Memora of August 31, 1971 issued pursuant thereto, and only after indications of the inadequacy of these measures to remedy t current discrimination, did plaintiffs resort to this litig as the only possible remedy.

WHEREFORE, plaintiffs respectfully pray that thi Court:

1. Enjoin defendants from performing psychologi evaluation or assessment of plaintiffs and other black chil by using group or individual ability or intelligence tests which do not properly account for the cultural background a experience of the children to whom such tests are administe

2. Enjoin defendants from placing plaintiffs an other black children in classes for the mentally retarded o the basis of results of such culturally discriminatory tests and testing procedures;

3. Enjoin defendants from retaining plaintiffs a other black children now enrolled in classes for the mentall retarded unless such children are immediately and then annuall re-evaluated a retested by means which properly account for the cultural ba

ground and experience of the children;

4. Enjoin defendants from refusing to place plaintiffs into regular classrooms with children of comparable age, from refusing to provide them with intensive and supplemental individual training in verbal skills, mathematics and other areas of the school curricula in order to bring plaintiffs and those similarly situated to the level of achievement of their peers as rapidly as possible;

5. Enjoin defendants from refusing to remove from the school records of these children any and all indications that they were or are mentally retarded or in a class for the mentally retarded. Require defendants to insure that individual children not be identified by results of individual or group I.Q. tests and that such results not be placed in children's school records or reported to classroom teachers or to other faculty or administrators on the school sites;

6. Require defendants to take the necessary action to correct any discriminatory variance and to bring the distribution of black children in classes for the mentally retarded into close proximity with the distribution of blacks in the total population of the school districts;

7. Require defendants to recruit and employ a sufficient number of black and other minority psychologists and psychometrists in local school districts, on the admissions and planning committees of such districts, and as consultants to such districts. Require defendants to make concerted efforts that psychological assessment of black school children be conducted and interpreted by persons adequately prepared to consider the cultural background of the child, preferably a person of similar ethnic background as the child being evaluated. Require the State Department of Education in selecting and authorizing tests to be administered to school children throughout

the state, to consider the extent to which the testing company has utilized personnel with minority ethnic background and experience in the development of a culturally relevant test;

8. Declare pursuant to the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations, that the current assignment of plaintiffs and other black students to California mentally retarded classes resulting in excessive segregation of such children into these classes is unlawful and unconstitutional and may not be justified by administration of the currently available I.Q. tests which fail to properly account for the cultural background and experience of black children;

9. Award to plaintiffs their costs of suit; and

10. Grant such further relief as the Court may deem just and appropriate and retain jurisdiction of the matter until complete relief has been effected.

Dated: November 18, 1971.

Respectfully submitted

Of Counsel:

Peter Pursley
Paul Roberts
Neal Snyder

Martin Glick
California Rural
Legal Assistance

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San Francisco Neighborhood
Legal Assistance Foundation

OSCAR WILLIAMS
NAACP Legal Defense and
Education Fund, Inc.

By
Attorneys for Plaintiffs

1 b.

In the United States District Court for the

Northern District of California

LARRY P. by his Guardian)
ad Litem, LUCILLE P., et al,)
)
Plaintiffs,)
)
-vs-)
)
WILSON RILES, Superintendent)
of Public Instruction for the)
State of California, et al,)
)
Defendants.)

AFFIDAVIT OF JANE R. MERCER

JANE R. MERCER, being sworn, says:

I am Associate Professor of Sociology at the University of California, Riverside and have recently completed an eight-year study of mental retardation in the City of Riverside, California. In this study, my staff contacted 241 agencies in the community who diagnosed and/or served the mentally retarded. They provided information on 812 individuals they had identified as mentally retarded. We also screened a representative sample of 6,907 persons under 50 years of age in the general population to determine if they had the "symptoms" of mental retardation--subnormal intelligence and subnormal adaptive behavior. This is the definition accepted by the American Association for Mental Deficiency (Heber, 1961). In this screening, we relied primarily on the Stanford-Binet LM Test for a measure of intelligence and used adaptive behavior scales which we developed specifically for the study to measure adaptive behavior.

Among those labeled as mentally retarded, 300% more Mexican-Americans and 50% more Blacks were identified as mentally retarded by community organizations than their proportion in the general population of the community. Only 60% as many English-speaking Caucasians (Anglos) were identified as would be expected from their proportion in the population. There were four and one-half times more Mexican-American children and twice as many Black children as would be expected from their proportion in the population nominated by the public schools and only half as many Anglo children. In the field survey, we found the rate per 1,000 with IQ test scores under 85 was 23.5 for Anglos, 424.3 for Mexican-Americans, and 179.6 for Blacks. We then explored the reasons for these differential rates and came to three major conclusions.

1. The American Association for Mental Deficiency suggests that persons with IQs below 85 be regarded as mentally retarded. Educational usage ordinarily defines persons with IQs below 79 as retarded. The designers of the two major IQ tests, Wechsler and Terman, advocate the traditional practice of considering only persons with IQs 69 and below as mentally retarded (Terman & Merrill, 1960; Wechsler, 1958). We examined the behavioral characteristics of the adults in our sample who failed the traditional criterion, IQ below 70, and compared them with adults who failed only the educational or the AAMD criteria. We found that most of the adults who were failing only the latter two criteria were, in fact, filling the usual complement of social roles for persons of their age and sex, that is, they had jobs, were financially independent or a housewife, and were able to maintain an independent existence. They were managing their own affairs and did not appear to require supervision, or control for their own welfare. We concluded that the traditional cutoff, IQ below 70, was the criterion most likely to identify those in need of assistance and supervision and least likely to stigmatize as mentally retarded persons who would be filling a normal complement of social roles as adults. We recommended that IQ 69 and below be the cutoff for defining the mentally retarded.

2. Although the American Association of Mental Deficiency

proposes that both IQ and adaptive behavior be measured in diagnosing the mentally retarded, in actual practice clinicians do not systematically measure adaptive behavior. When we compared the social role performance of persons who had low IQ scores but were passing in adaptive behavior, we found that 80% of these persons had graduated from high school, all held jobs, all were able to work without supervision, traveled alone, and were able to manage their own affairs. Their social role performance tended to be indistinguishable from that of other adults in the community. We concluded that clinicians should develop a systematic method for assessing adaptive behavior as well as intelligence in making clinical assessments of ability and should operationalize the two-dimensional screening procedure advocated by the AAMD.

3. Our third major conclusion was that the IQ tests now being used by psychologists are, to a large extent, Anglocentric. They tend to measure the extent to which an individual's background is similar to that of the cultural configuration of Anglo, middle-class society and are not valid, as normed, for Mexican-American and Black populations. When we studied the correlation between the IQ test scores of the Mexican-Americans and Blacks in our sample and the sociocultural characteristics of their families, we found that 20% of the differences between the scores of individuals in each of those groups could be accounted for, statistically, by sociocultural background. When we held sociocultural background constant, statistically, we found that the average IQ test scores for Mexican-Americans and Blacks in our sample were approximately 100, the norm for the test. In other words, the difference in average IQ test scores found between the norms for the test and the average for Mexican-American and for Black groups disappears when the effect of sociocultural characteristics is held constant.

4. We re-evaluated the children in classes for the educable mentally retarded in two school districts in southern California. In this re-evaluation we used the findings from our study, i.e. a person was defined as mentally retarded only if he had an IQ of 69 and below, if he was subnormal both on an IQ test and in adaptive behavior, and he was still

rated as subnormal after the effects of the sociocultural background had been taken into account. When this definition was used, we found that approximatel 75% of the children in those classes would not be diagnosed as mentally retarded. We also found that the overrepresentation of Mexican-American and Black children in those classes disappeared when this definitional process was used. That is, the proportion of children of each ethnic group in those classes then approximated the proportion of children in each ethnic group in the general population of the school districts being studied. We also found when we used this diagnostic process in analyzing the persons screened in our field survey, the overrepresentation of Mexican-Americans and Blacks which originally appeared in the findings from that survey were accounted for. That is, when adaptive behavior was measured, when the cutoff of IQ below 70 was used, and when sociocultural characteristics were taken into account the rates for mental retardation in the three ethnic groups in the community were approximately equal.

The complete findings for this study will be published by the University of California Press during 1972 under the tentative title Labeling the Mentally Retarded.

Jane R. Mercer

JANE R. MERCER

Subscribed and sworn to before me
this 5th day of November, 1971

E. K. Lambert

Notary Public in and for said
County and State.

OFFICIAL SEAL
E. K. LAMBERT
NOTARY PUBLIC
RIVERSIDE CO., CALIF.
My commission expires 4-22-75

References

Heber, R. F. A manual on terminology and classification in mental retardation. American Journal of Mental Deficiency, 1961, 64. Monograph Supplement. (2nd ed.)

Terman, L. M., & Merrill, M. A. Stanford-Binet Intelligence Scale. Boston: Houghton Mifflin, 1960.

Wechsler, D. The measurement and appraisal of adult intelligence. (4th ed.) Baltimore: Williams & Wilkins, 1958.

EXHIBIT "B"

In the United States District Court for the

Northern District of California

LARRY P. by his Guardian ad Litem, LUCILLE P., et al.,

Plaintiffs,

vs.

WILSON RILES, Superintendent of Public Instruction for the State of California, et al.,

Defendants.

)Civil NO.

)AFFIDAVIT OF HAROLD E. DENT

Harold E. Dent, being sworn, deposes and says:

I am the Western Regional Representative of the Association of Black Psychologists. Between October, 197 and March, 1971, my colleagues of the Bay Area Association of Black Psychologists HE and I performed psychological testing and evaluation of the six black children listed as plaintiffs in this case. All these children had been classif as mentally retarded by the San Francisco Unified School Districts and had been placed in special programs for the retarded. The results of our re-evaluation indicated clearly that all had been inappropriately placed in such classes and that the misclassification resulted from testing devices and procedures which did not properly account for the racial and cultural backgrounds of these children.

The attached evaluations are true and correct copie of the reports written by members of the Bay Area HED Association of Black Psychologists after the re-evaluations.

Harold E. Dent

Harold E. Dent, Ph.D., Affi

Subscribed and sworn to before me this 23rd day of November, 1971, at San Francisco, California.

Darleen R. Harader

Notary Public

OFFICIAL SEAL
DARLEEN R. HARADER

I.C.

PSYCHOLOGICAL EVALUATION

NAME:	Larry P.
AGE:	Eleven years, nine months
BIRTHDATE:	December 29, 1959
DATE EVALUATED:	October 10, 1970
EXAMINER:	Gerald I. West, Ph.D.

TEST ADMINISTERED:

Larry was given the Wechsler Intelligence Scale for Children.

OBSERVATIONS:

Larry appeared to be a polite, friendly, and cooperative subject. He seemed to be much at ease during the entire examination. As the various subtests increased in level of difficulty for him, he became somewhat restless as evidenced by frowning, by taking long hard breaths, by turning his head from side to side and by shifting in his seat. When the examiner went to a different subtest and less difficult questions, Larry resumed his prior state of being at ease. He constantly smiled and talked very freely with the examiner throughout the administration of the test.

Many times during the examination, Larry remarked, "That's hard, I don't know." The examiner reassured Larry constantly throughout the examination in an effort to have the subject make a serious attempt in answering the items. Larry appeared to be amazed when he was told he was doing a fine job. He evidenced his amazement by saying, "Are you sure? Did I really get it right? I don't know a lot of right answers." The subject exhibited the greatest degree of seriousness and motivation in the subtest requiring him to arrange pictures which tell a story. When told how well he was performing, Larry said, "I bet I can get them all right." He then stopped smiling, sat on the edge of his seat and seemed to listen more attentively to the questions asked by the examiner. Larry willfully assisted the examiner throughout the performance portion of the test by putting the cards and blocks into their appropriate boxes and smiled very gleefully when told by the examiner what a great help he was.

Larry's examination behavior may be characterized by his willingness to give up easily, by his apparent doubt, and by his need for constant reinforcement. Larry had taken this examination February 26, 1969, through the San Francisco Unified School District. At that time he achieved a Verbal I.Q. of 71, a Perfromance I.Q. of 85 and a Full Scale I.Q. of 75.

TEST RESULTS AND INTERPRETATION

Larry's Chronological Age was eleven years, nine months. On the Wechsler Intelligence Scale for Children, he obtained a Verbal I.Q. of 100, Performance I.Q. of 100, and Full Scale I.Q. of 100. These I.Q.'s correspond to the 50th percentile for children his age and indicate that he is a boy of average mental ability. On the various subtests, he obtained the following scaled scores:

VERBAL TESTS	
Information	5
Comprehension	9
Arithmetic	9
Similarities	12
Vocabulary	5
Digit Span	10

PERFORMANCE TESTS	
Picture Completion	8
Picture Arrangement	14
Block Design	12
Object Assembly	6

Larry's weaknesses appeared to be more closely related to his lack of attention to detail and low achievement in school type learning. He scored lower and relatively weaker in his knowledge of assumed commonly known facts and in his ability to understand the meaning of certain words--two subtests generally sensitive to school type learning. The subject scored relatively lower in the performance portion of the tests requiring him to identify missing parts of pictures and in putting certain pieces together to make an object. These lower scores may be associated with motivation, lack of attention or a disturbance in the perceptual organization of the subject - the etiology of which is not suggested by this test.

Larry appeared to be relatively strong and above average in common sense reasoning and demonstrated average ability in abstract verbal thinking. These strengths were demonstrated in his above average ability to see the relationship between paired objects and his average ability to understand why certain things are done in our society. He also appeared above average in his ability to organize sequences of events into meaningful logical patterns.

It was noted that Larry appeared to have very little confidence in his intellectual ability and seemed to "give up" easily on some tasks. Constant reinforcement by the examiner was necessary for the subject to exhibit serious effort in answering many of the test items. These tendencies in the subject may be reflected in the classroom by general inattentiveness to instruction, poor motivation, and lack of confidence in learning. This tendency may be more pronounced in school type learning requiring him to learn the meaning of new words and in reading.

Larry is a Black youth who lives in an almost entirely poor Black section of San Francisco. His mother indicated as well as Larry that he has no difficulty functioning at home or in the community, that he understands fully well whatever is said to him, is very capable of caring for himself and doing whatever he wants to do. Larry's school type learning appears to encompass words, expectancies and behaviors quite different from those necessary for his out of school survival. His hesitancy and lack of assurance in taking this test may be an indication of his fear of failing and history of failing with school type learning. Since this test is heavily tainted with school type learning, the score he achieved on this test may be a spuriously low indicator of his general ability.

It is suggested that Larry not be classified as mentally retarded but be given remedial instruction in a non-threatening and encouraging atmosphere where he may be able to experience success and possibly be motivated to try. On the basis of test information, Larry may be expected to have the amount of difficulty in learning normally experienced by a child his age of average mental ability. His inattentiveness and below average classroom performance do not appear to be related to his intellectual ability.

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In the United States District Court for the

Northern District of California

LARRY P. by his Guardian ad litem, LUCILLE P., et al.,)
Plaintiffs,)
-vs-)
WILSON RILES, Superintendent of Public Instruction for the State of California, et al.,)
Defendants.)

Civil No.

MEMORANDUM IN SUPORT OF ORDER TO SHOW

FACTUAL BACKGROUND

The facts, simply stated are:

A. California's black school children are currently being segr
into classes for the mentally retarded. Black children comprise approxi
28.1% of the school population of the San Francisco Unified School Distr
are more than 60% of those enrolled in classes for the educable mentally

(EMR). Among elementary school children where the deprivation is even more crucial, 69% of the elementary school EMR classes are black. Statewide, the disparity is even greater. Blacks constitute 9.1% of public school children in California, but 27.5% of those in classes for the retarded. Such a disparity is statistically impossible.

B. The discriminatory assignment occurs because it is based upon the results of tests and testing procedures which do not properly account for the cultural background of these black children. Upon retesting by Black Psychologists utilizing culturally relevant criteria, all of the plaintiffs scored higher than the maximum score used by the county as a ceiling for placement in mentally retarded classes. They averaged 26.5% points higher than earlier scores. Thus, we are concerned about pupils who have been inappropriately placed in EMR classes as a direct result of discriminatory tests and testing methods. In an analagous case, Griggs v Duke Power Co. 401 U.S. 424 (1971), involving employment discrimination on the basis of culturally biased tests, the Supreme Court unanimously held the tests unlawful since they were not significantly related to successful job performance.

C. This discriminatory assignment has a devastating effect tantamount to a life sentence of illiteracy and public dependency and a permanent stigma of inferiority. Very little is learned in most EMR classes and the curriculum is severely limited.

II. PLAINTIFFS AND THE CLASS THEY REPRESENT ARE BEING DEPRIVED OF THEIR FUNDAMENTAL RIGHT TO RECEIVE AN EDUCATION AND THEIR RIGHT TO AN EQUAL EDUCATION

The right to receive an education, and its fundamental value, was explicitly defined by the United States Supreme Court in Brown v Board of Education of Topeka, 347 U.S. 483, 493, 74 S. Ct. 686 (1954), when it declared:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any

> child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (emphasis added)

The same principle has been reaffirmed by the California Supreme C which pointed out the "retarding" effects of unequal education in Jackson Pasadena City School District, 59 Cal. 2d 876, 31 Cal. Rptr. 606 (1963):

> "The separation of children from others of similar age and qualifications solely because of race may produce a feeling of inferiority which can never be removed and which has a tendency to retard their motivation to learn and their mental development." (Id. at p. 609)

And more recently, the same court determined that "...the distin and priceless function of education in our society warrants, indeed compel our treating it as a fundamental interest." Serrano v Priest, 96 Cal. Rptr 601, 5 Cal. 3d 584, at 608-9.(1971)

It does not require elaboration to point out that defendants fail provide to plaintiffs their right to an education, let alone their right to equal education, when they segregate these black school schildren into clas aimed only at making mentally deficient children "economically useful and socially adjusted." (Education Code Section 6902).

III. PLAINTIFFS ARE SUFFERING CONTINUING GREAT AND IRREPARABLE INJU

These black children who remain in classes for the mentally retard throughout California fall academically farther and farther behind their pe with each day that passes. Their wrongful retention in these classes increa the danger that they will be cut off from any chance of being gainfully empl with the result that they may become public charges and may suffer further of self-esteem. Such retention will directly increase the psychological ha done to them, and subject them to the taunts and ridicule of other student Similarly, failure to erase from their records all reference to mental ret ation will threaten them with inability to find work (at least desirable wo discriminatory treatment from future teachers, and a permanent stigmatizati

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with consequent effects on their morale.

The reasonable requests for relief by plaintiffs herein are the minimum necessary to prevent further irreparable injury to these children and to begin on the road to removal of the stigma of retardation and inferiority and to an opportunity for a normal and productive life.

DATED: November 23, 1971.

Respectfully submitted:

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In the United States District Court for the

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LARRY P. by his Guardian
ad Litem, LUCILLE P., et al.,

Plaintiffs,

-vs-

WILSON RILES, Superintendent
of Public Instruction for the
State of California, et al.,

Defendants.

Civil Action No.

C-71-2270 RFP

MEMORANDUM IN SUPPORT OF

PRELIMINARY INJUNCTION

STATISTICS

In this action, plaintiffs seek to suspend the use of culturally discriminatory intelligence tests which are the principal instruments currently used to perpetuate a statewide segregation of black children in California's public schools.

For example, plaintiffs and other black children are abundantly represented in classes for the Educable Mentally Retarded. (See, Exhibits C and D to plaintiff's complaint, statistics showing the racial breakdown of pupils in the public schools and in classes for the retarded). It is interesting to note by comparison the figures at the opposite end of the "tracking" spectrum, classes for the mentally gifted. Black children who comprise 9.1% of California's public school children and 27.5% of those in classes for the educable mentally retarded, represent only 2.5% of those in classes for the gifted. (See, Exhibit D to plaintiff's complaint).

Such statistics alone suffice to establish a *prima facie* case of discrimination. See, *e.g.* *Marquez v. Ford Motor Co.* F2d (8 Cir. 1971); 3 CCH Empl.Prac. Dec. section 8156; *Parham v. Southwestern Bell Tel. Co.* 433 F.2d 421 (8th Cir. 1970); *Jones v. Lee Way Motor Freight Inc.* 431 F2d 245 (10th Cir. 1970) *cert denied* (1971); *U.S. v. Dillon Supply Co.* 429 F2d 800 (4th Cir. 1970); *Local 189 United Papermakers and Paperworkers v.* U.S. 416 F. 2d.980 (5th Cir. 1969) cert. denied 397 U.S. 919 (1970) *United States v. Hayes International Corp.* 415 F2d 1038 (5th Cir. 1969). In a recent case in this circuit, *Carmical v. Craven* No. 26,236 (9th Cir. November 4, 1971) statistics showing that a substantial number of otherwise eligible minority and low-income persons were excluded from the master jury roll were held to establish a *prima facie* case that the test utilized was discriminatory.

VALIDITY OF THE TESTS

Where a testing instrument has produced such a discriminatory effect, the burden should be on defendants to show the relationship of the test to the purpose for which it is ostensibly employed, *Griggs v. Duke Power Co.* 401 U.S. 424 (1971); *Johnson v. Branch* 364 F2d 177 (4th Cir. 1966); *Chambers v. Hendersonville Bd. of Ed.* 364 F2d 189 (4th Cir. 1966). Contrary to defendant's contention, the lack of a specific intent to discriminate on the part of educational officials cannot offset the grossly discriminatory results of the tests. *Griggs v. Duke Power Co. supra.*; *Gaston County v. United States* 395 U.S. 285 (1969); *Gomillion v. Lightfoot* 364 U.S. 339 (1960); *Carmical v. Craven, supra.*

Indeed, where the State's actions create an inherently suspect classification (e.g. race) or affect a fundamental interest (e.g. public education) the State must demonstrate a compelling justification for its actions. See e.g. Loving v. Virginia 388 U.S. (1967); Harper v. Va. State Board of Elections 383 U.S. 663 (1966); Shapiro v. Thompson 394 U.S. 618 (1969); Hobson v. Hansen 269 F.Supp. 401 (D.D.C. 1967) aff'd sub nom Smuck v. Hobson 408 F.2d. 178 (D.C. Cin. 1969). Applying this stringent standard of scrutiny, the district court in Chance v. Board of Examiners F.Supp. 40 Law Week 2071 (S.D.N.Y. July 14, 1971) enjoined the use of a competitive examination as a prerequisite to obtaining a supervisory position in the school system, where the test had the de facto effect of discriminating against Black and Puerto Rican applicants.

Defendants, far from claiming that the tests have some validity, admit that they are useless. (See Exhibit G to plaintiff's complaint). Such an admission is appropriate in light of the abundant literature that intelligence tests are culturally biased. (See, plaintiff's complaint, par. 4, Exhibits A and B to the complaint and Exhibit "H" hereto).

As Judge Shelly Wright found in Hobson v. Hansen, supra at p. 514:

> "The evidence shows that the method by which track assignments are made depends essentially on standardized aptitude tests which, although given on a system-wide basis are completely inappropriate for use with a large segment of the student body. Because the tests are primarily standardized on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or, more precisely, according to environmental and psychological factors which have nothing to do with innate ability."

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TRACKING AND IRREPARABLE HARM

Defendants argue that plaintiffs have not shown irreparable harm because placement in classes for the retarded is not necessarily permanent, and because some of the plaintiffs have in fact already been removedfrom such classes. This claim of temporary placement is hardly consistent with the claim that the IQ tests used for such placement measure innate ability. For, if these children were grouped in accordance with their ability to learn as measured by some more valid device, a permanent grouping would perhaps be appropriate. Instead, as Martin J. Dean, Assistant Superintendent for Special Education in the San Francisco School District has said "the object is for the children to remain in the program from time of placement until graduation from senior high school." (if they graduate.) (See Exhibit I to this Memorandum, Answers to question 9, 4-17-70 and to questions 6, 3-26-70). There should be little question that for the vast majority of students in EMR classes, their misplacement in such classes is for the duration of their schooling.

As for the ability of the parent to withdraw his consent for such placement, it simply cannot be that easy. A completely voluntary program would hardly be consistent with the grossly disproportionate numbers of black children in such classes, unless parents and their children were lacking the requisite information to make a valid consent. In fact, several of the plaintiffs and their parents, when interviewed by black psychologists or their attorneys were unaware that they were in classes for the retarded or that they had previously been tested for that purpose. (Exhibit H hereto p.1) Perhaps the change of labels described by defendants in their return provides one explanation for the lack of awareness of these parents about the type of schooling their children were receiving.

But whatever labels are employed, the stigma and feeling of inferiority will remain. And when defendants insist that the IQ tests are not the sole determinant of EMR placement and that other factors are relied upon, we must consider the hidden effect of intelligence test scores on the other factors such as school performance. The formation of teacher expectations and those of the children as a result of such scores is well-documented. See, e.g. Rosenthal and Jacobson, Pygmallion in the Classroom (1968).* As Judge Wright noted in Hobson:

> "The real tragedy of misjudgments about the disadvantaged students' abilities is the likelihood that the student will act out the judgment and conform to it by achieving only at the expected level." (at p. 491).

Indeed, despite the established invalidity of these intelligence tests, an Examiner's Manual for the Lorge-Thorndike group test (used in most California schools) provides under the heading "using results" on p. 11:

> "Setting Standards of Expectancy for the Individual Pupil: Probably the most general use of intelligence test results has been to help teachers set standards of expectancy for each pupil. Teachers will probably find that the Verbal Battery of the Lorge-Thorndike Tests is most useful for this purpose. A pupil's expected level of performance may affect the teacher's judgments or actions in several different ways.
>
> 1. The amount or difficulty of the tasks assigned to a pupil may be adjusted to take account of ability level. High-scoring children may be given supplementary activities to permit

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* Defendants also claim that the harm will be rectified by the use of adaptive behavior tests to "substantiate" the results of the standardized intelligence tests. Plaintiffs have no objection to adaptive behavior scales or other individualized techniques of psychological evaluation. Yet, plaintiffs wonder about the value of the standardized tests as the initial indication in light of their will documented cultural bias and especially of their tendency to affect the conclusions drawn from other or supplemental devices and techniques of evaluation (See paragraphs 17-18 ps. complaint, Exhibit "F" pp. 2-6, and Exhibit "H" pp. 2-3 .

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> them to progress at a more rapid rate, or to provide enrichment experiences. Children of lower intellectual ability may be permitted to move along more slowly, and supplemental activities may be relatively simple and concrete. Pupils whose achievement is quite different from their aptitude, as indicated by intelligence scores, may require special study.
>
> 2. In reports to parents, and especially in informal teacher-parent conferences, interpretation of school progress should take account of the pupil's ability. In the case of a pupil of low ability, performance somewhat below the average of the group should be interpreted as commendable and satisfactory. Pupils of high ability should be expected to surpass the group in achievement, though it is probably not reasonable to expect them to be as outstanding in achievement as in the measure of intelligence. This does not mean that I.Q. scores should be reported to parents. It is generally best simply to suggest that a pupil may be able to do better work, if that is so, or is at a satisfactory level of achievement.
>
> Vocational Guidance: The Lorge-Thorndike Tests can be used to provide an index of general intellectual level for use in estimating the level of job to which the individual may reasonably aspire.
>
> Educational Guidance: A pupil and/or his parents have various decisions to make during junior and senior high school. These decisions involve such matters as which curriculum to enter in high school, whether to plan for further education after high school, and, if so, what type to plan for. An intelligence or scholastic aptitude test provides evidence which should receive serious consideration in decisions on such matters.
>
> Formation of Class Groups: Some school systems organize classroom groups by ability level. While not passing judgment on the merits of this procedure, results from the Lorge-Thorndike Tests can be used, either alone or in combination with achievement measures, if grouping is to be undertaken. If special classes are provided for intellectually gifted children, assignment to these classes should be based on results from the Verbal Battery.
>
> Grouping within Class: Many teachers find it helpful to form small groups within a class for purposes of instruction. Grouping for instruction in beginning reading is perhaps the most frequent. Level 1 of the Lorge-Thorndike Tests may be used, either alone or in combination with a reading readiness test, to guide the teacher in forming such working groups."

Thus, the testing manual sanctions and encourages using of the test scores to peg each child and to chart his entire educational course. The consequences are dire and they extend far beyond the child's educational career. See, e.g. California Education Code section 10751 regarding the access of school personnel, employer, law officers and institutions of higher learning to a child's school records.

Whatever the specific harm done to these children by defendant's discriminatory testing and tracking devices, it should be clear by now that segregated education is inherently unequal, detrimental to school children and in contravention of the Fourteenth Amendment. Brown v. Board of Education of Topeka 347 U.S. 483 (1954); See also Spangler v. Pasadena City Board of Education 311 F.Supp. 501 (C.D.Cal. 1970) where the Court relied upon Brown in finding that interclass grouping based upon discriminatory tests violated the rights of minority children.

RELIEF

Once a right and violation have been shown, this Court has very broad equity powers to shape a decree to meet the continuing problem of protecting the constitutional rights of school age children to equality of educational opportunity. Swann v. Charlotte Mecklenberg Bd. of Ed. 402 U.S. 1 (1971).

The obvious first step is to suspend the use of the chief instrument of discrimination pending development of culturally adequate measures of intellectual ability. This is the solution proposed by the President's Commission on Mental Retardation and by many other professional groups. (See Exhibit "H" hereto p. 3.). Defendants have not and cannot met their heavy burden of justifying the continued use of the current tests or perpetuation of the present discrimination.

It might also be noted that California public schools offer a number of special programs other than that for the Educable Mentally Retarded. (See, e.g. Exhibit I attached hereto pp. 1-6 and Exhibit D to plaintiff's complaint). Significantly, none of the other programs manifest the same disproportionate racial representation as that of EMR or of Mentally Gifted, the only two which rely primarily on intelligence tests. The fact is that children can be adequately identified and placed in any special programs without reliance on culturally biased standardized tests. Indeed, it is defendants' constitutional duty to utilize non-discriminatory screening and evaluation techniques in order to ascertain and meet the special educational needs of individual school children.

Most of the other relief sought follows from the invalidiy of the tests and the harm caused by them. This injury can be rectified only by obliterating the invalid test results, immediately re-evaluating those students who may have been misplaced in classes for the retarded, and in assisting those for whom some other placement is indicated to make a smooth transition into the mainstream of the public school system.

It must be stressed, moreover, that this Court has the duty not only to bar future discrimination but to eliminate the effects of past discrimination. Louisiana v United States 380 U.S. 145 (1964). Plaintiffs would not want to be rid of the discriminatory tests only to find the defendants using more subjective factors to perpetrate the same injury. Thus, this Court should not only suspend the use of intelligence tests until a more appropriate measure is developed, but as an interim measure, the Court should insure that the discriminatory tracking is also remedied.

In United States v Iron Workers Local 86 443 F. 2d 544 (9th Cir. 1971) cert denied __ U.S. __ No. 71-380 (1971), this Circuit approved a district court decree ordering building construction unions to offer immediate job referrals until blacks comprised about 30% of union membership in order to rectify effects of past discrimination. See also Carter v. Gallagher No. 71-1181 (8th cir. en banc, Jan. 7, 1972) Contractors

Association of Eastern Pa. v SEcretary of Labor 442 F. 2d 159 (3d. Cir. 1971); United States v. Central MOTOR Lines, Inc. 325 F. Supp. 478 (W. D. N. C. 1970) where similar ratio goals were utilized to remedy effects of past discrimination in employment.

Such relief is by no means limited to the area of employment. It has now been established by the Supreme Court that the use of mathematical ratios as a starting point in the Process of shaping a remedy is now within the equitable remedial discretion of the district courts. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S.1, 25 (1971). And a starting point is exactly what it should be here. Obviously this kind of solution to problems of discrimination is somewhat arbitrary and not as desirable as the use of a culturally relevant instrument to identify and place children with special needs. But imposition of a ratio as an interim measure, pending the availability of appropriate testing devices, seems necessary to rectify the consequences of the long-standing segregation wrought by the current intelligence tests.

Dated: January 14, 1972

Respectfully submitted,

Michael S. Sorgen
Attorney for plaintiffs

AFFIDAVIT - EXHIBIT H

We, Harold E. Dent, Ph. D., Thomas O. Hilliard, Ph.D. William D. Pierce, Ph.D. and Gerald I. West, Ph.D. being each duly sworn, depose and say:

We, as members and representatives of the Bay Area Association of Black Psychologist strongly affirm that the ability and intelligence tests which are part of the set of criteria mandated by the State Department of Education are inappropriate and inadequate techniques. They are based on white, middle class norms, values and experiences and are hence culturally biased against Black children. That is, these tests systematically and consistently work against Black children underestimating their actual intelligence potential based on their experiential background and systematically and consistently falsely label Black children.

The case presented by the plaintiffs whose Black children have been inappropriately evaluated and placed in EMR classes is clearly indicative of the resultant damage from the continued use of these inadequate and culturally irrelevant measures of intellectual ability.

Between October 1970, and March 1971, plaintiffs were independently retested by members of the Bay Area Association of Black Psychologists, who are fully qualified to administer such tests.* These psychologists are from the same cultural background as plaintiffs and utilized certain psychological techniques which took into account the cultural experience of plaintiffs. On retesting plaintiffs' scores ranged from 79 to 104, every one of them above the maximum score (75 in the San Francisco Unified School District) set by defendants as a ceiling for placement in EMR classes. In fact, plaintiffs achieved "full scale" (combined verbal and performance) I.Q. scores ranging from 17 to 38 points higher than they received when tested by school psychologists. This retesting clearly indicates the impact which cultural factors, choice of language and rapport with the tester have upon plaintiffs' ability to perform well on the tests. The retesting also points out the invalidity of testing procedures used by defendants in screening, evaluating and placing Black children in such classes.

For a number of years psychologist and others have been aware of the inadequacies and deficiencies of existing intelligence measures; however these instruments continue to be used. It is therefore logical, reasonable, and consistent that the Bay Area Association of Black Psychologists take an unequivocable stand to insure that no further damage be inflicted on the Black children in the State of California as a result of the administration of the standard individual and group tests of intelligence. We therfore endorse the plaintiffs' request and call for an immediate moratorium on the use of said tests and support the recommendation that all Black children presently labeled mentally retarded and enrolled in classes for the educationally mentally handicapped be reevaluated and that immediate steps be taken to require that all persons administering such tests be provided with appropriate inservice training to enable these administrators to become thoroughly familiar with the culture and experiential background of Black and other minority students whom they will be required to evaluate.

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*At the time of re-evaluation parents stated that they were not aware that their children were being tested for retardation or that their children had been placed in classes for the mentally retarded.

Ir should be made abundantly clear that while our present concern is focused on intelligence tests as they have culminated in the improper placement of the plaintiffs in classes for educable mentally retarded, the extent of abuses of current intelligence tests with Black children is far broader. That is, the disproportionately large number of Black children inappropriately labeled as retarded and placed in EMR classes is a more blatant or extreme form of the damage done to Black children. A less obvious but just as severe damage is that Black children based on I.Q. tests are underrepresented in classes for the "gifted" and therefore often Black youth fail to receive the special education necessary to insure a level of stimulation and instruction consistent with this high level of intellectual functioning. State Board of Education statistics (1970) show that only 2.5% of children in gifted classes are Black. Moreover, an even larger number of Black students whose intellectual ability falls within the normal range are consistently underestimated by school psychologists and teachers because of the existing intelligence tests. This last point is particularly significant in that it has negative consequences for a majority of Black school children. A number of recent psychological studies have demonstrated that teacher expectancies are significantly related to student academic performances. Rosenthal and Jacobson report in their book "Pygmalion in the Classroom: Teacher Expectation and Pupil's Intellectual Development," that a child's classroom performance can be influenced by the level of expectation the teacher has about that child's intellectual ability. They demonstrated, in a series of studies which were conducted in several major cities throughout the nation, that by informing teachers of the scores supposedly obtained by students that there was a direct relationship between the progress made by those students and the expectation the teacher had of those students based upon the scores the students supposedly achieved on intelligence tests.

Semler and Iscoe (Journal of Ed. Psychology, 1953, 54) present findings that showed no overall race differences in learning ability and further state th educators should exercise caution in inferring learning ability from measured intellectual level.

In 1968 the National Association of Black Psychologists, responding to the concerns of the Black Community and years of professional experience in psycholog testing, requested a moratorium on intelligence tests. This moratorium was to be in effect until culturally fair and adequate measures of the intellectual functioning of Black children were developed. After this position was taken by Black psychologists, a number of other groups throughout the country followed by taking similar positions.

The Governing Council of the Society for Psychological Study of Social Issues of the American Psychological Association issued a statement in March of 1969. The statement was: "We must also recognize the limitations of present-day intelligence tests Largely developed and standardized on White middle-class children, these tests tend to be biased against Black children to an unknown degre (Albee, et al, American Psychologist, 1969, 24)." This statement was endorsed by 18 eminent psychologists, among whom is the present president and immediate past-president of the American Psychological Association, In September of 1969, the Association of Black Psychologists, at their national convention, publicly announced its position concerning Standard Psychological Tests of Intelligence, as clearly stated by the then chairman, Dr. R. Williams.

Similarly, A. G. Wesman, Vice President of The Psychological Corporation, in a presidential address presented to the Division of Tests and Measurements of The American Psychological Association stated: "Intelligence is an attribute, not an entity. Intelligence is the summation of the learning experiences of the individual." Recognizing the limitations of IQ tests. a spokesman for Houghton Mifflin Company, which publishes a variety of IQ tests, was quoted in the Wall Street Journal on June 12, 1969, that manuals for administration of tests publishe by the firm caution administrators of the tests to "realize that no intelligence test will measure the innate ability of an individual" and the manuals go on to caution the tester to consider the experiences that a child has had in interpreting

the sources. Recognizing that the authorities who in large measure represent the testing industry, indicate without qualification that the experience of the child contributes to his intellectual functioning and must be incorporated into the consideration of test results, it is evident that the instruments required by the California State Department of Education do not meet the criteria as identified by these test experts.

There facts were made clear in a statement presented by the Bay Area Association of Black Psychologists to the San Francisco Board of Education on May 5, 1970, when it was pointed out that the tests required by the State of California were standardized on populations which did not include representative samples of Black minority subjects. Specifically, a report compiled by the San Francisco Unified School District stated that there was "no mention of minority group representation in the standardization samples" of the two most commonly used instruments, the Wechsler Intelligence Scale for Children and the Stanford-Binet Intelligence Scale test. The lack of consideration for obtaining representative samples in standardization of these instruments is further emphasized by the fact that the Peabody Picture Vocabulary test, an instrument which is being depended upon more heavily now than ever before, was standardized on a population of approximately 4,012 White children living in and around Nashville, Tennessee.

Another variable involved in the issue of psychological assessment of Black children is the variable of the ethnic background of the administrator and the interaction of that administrator with children of a different ethnic background. Dreger and Miller (Psychology Bulletin Monograph, 1968, Vol. 70) reviewing comparative psychological studies of Blacks and Whites 1959 - 1965 concludes that on both the child and adult levels the effects of the examiner appear to be important in some studies, especially across racial lines. In three recent studies, it was determined that the ethnic background of a test administrator significantly influenced the performance of not only children of a different ethnic background, but children of the same ethnic background. Savage and Bower (1971) reported that the scores of Black children were significantly higher when tests were administered by Black administrators than the scores of a comparable group of Black students being tested by White administrators. Turner (1971) obtained similar results with White students and administrators from different ethnic groups. Thomas, Hertig, Dryman and Fernandez (1971) reported similar results using a population of Puerto Rican students and administrators of different ethnic backgrounds. The problem which we face is multi-faceted.

Though the problem is multifaceted it must be squarely faced and dealt with. The damage to black children is clearly demonstrated; being a victim of these culturally invalid and irrelevant tests of intellectual ability is a severe violation of civil and human rights. It is thus imperative that we stop whatever enterprise that victimizes, oppresses and denies the full realization of Black children's potential. In conclusion we the members and representatives of the Bay Area Association of Black Psycholotists reiterate our unequivocal stand and call for an immediate moratorium on the use of the current test of intellectual ability in use in the state of California.

Gerald D. West, Ph.D.

Harold E. Dent, Ph.D.

Thomas Hilliard, Ph.D.

William D. Pierce, Ph.D.

Signed and sworn before me this fourteenth day of January, 1972 at San Francisco California

HARVEY M. FREED
NOTARY PUBLIC CALIFORNIA
City and County of San Francisco
My Commission Expires July 21, [illegible]

Harvey M. Freed
Notary Public

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EXHIBIT I

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March 26, 1970

To: Dr. Z. L. Goosby, Dr. Laurel E. Glass
Members, Board Committee on Special Education

From: Martin J. Dean, Assistant Superintendent
Special Educational Services
Alice Henry, Director, Pupil Services
Richard C. Robbins, Director, Special Education

Subject: Response to Questions Submitted March 4 and 5, 1970
by the Association of Black Psychologists and the
California Rural Legal Assistance

The attached material has been prepared in response to the questions referred to above. It is in the depth that time, staff (present and augmented), and data have been available. The report is being sent to the distribution listed below. Some questions require additional time and answers will be forwarded as soon as they are available.

MJD:RCR:mh

Copies to:
Dr. Robert E. Jenkins, Superintendent of Schools
Dr. E. D. Goldman, Associate Superintendent, Instruction
Dr. A. D. Pierce, Western Regional Representative,
Association of Black Psychologists
Dr. G. I. West, Association of Black Psychologists
Mr. Martin R. Glick, California Rural Legal Assistance
Mr. Michael S. Sorgen, Neighborhood Legal Assistance Foundation

Response to Questions
Association of Black Psychologists
Dated 3/4/70

Question 1. Describe the nature of the special education classes in the San Francisco Unified School District; how do they differ and what are the criteria and procedures for placement of a child in a special education class?

1.1 Nature and Basic Differences

1.11 Programs for Educable Mentally Handicapped

Classes for children "who because of retarded intellectual development as determined by individual psychological examination are incapable of being educated effectively and profitably through ordinary classroom instruction". E. C. 6901. Children may remain with a special teacher for most of the school day (self-contained class) or remain in a regular class except for periods spent with a special teacher (integrated class).

Program is designed to stress development of basic skills through repetition and structuring in life situations that motivate through concrete rather than abstract concepts. At the secondary level pre-vocational attitudes and vocational skills are developed through work study experiences.

1.12 Program for Trainable Mentally Handicapped

Classes designed for "minors who may be expected to benefit from special educational facilities designed to educate and train them to further their individual acceptance, social adjustment and economic usefulness, in their homes within a sheltered environment". Classes located at Louise Lombard School.

1.13 Programs for Educationally Handicapped

Self-contained classes and small group instruction (Learning Disability Groups) for students "other than physically handicapped..... or mentally retarded.... who by reason of marked learning or behavioral problems or a combination thereof, cannot receive the reasonable benefit of ordinary education facilities". E. C. 6750.

The program is designed to provide careful, in-depth analysis by a multi-discipline committee of the learning and adjustment difficulties of each child. Subsequently there is staff development of individual prescriptive correctional experiences and return to the regular school program as soon as success in such is a reasonable risk. Classes limited in size to 12. LDG groups limited to 32 contacts per day.

1.14 Programs for Physically Handicapped

Classes in schools or hospitals, home instruction, individual instruction for "any minor who, by reason of physical impairment, cannot receive the full benefit of ordinary education facilities". E. C. 6802. "Applies to pupils with speech handicaps, physical illnesses, orthopedic, visual handicaps or dysphasia as determined by physicians and qualified educators." According to the degree of handicap children are served in special schools (Gough and Sunshine), in integrated classes with the assistance of specially trained teachers, or by itinerant specialists.

1.2 Criteria for Eligibility of Children

1.21 Educable Mentally Handicapped

1. Inability to compete academically with peers in the regular classroom.
2. Low scores in group tests - both academic and mental.
3. Classroom teacher evaluation of reason for inability to achieve as being due to mental handicap.
4. Individual mental tests which agree with the indications.
5. Developmental history which reviewed does not indicate another cause.
6. Parental conference with social worker or psychologist to be sure all information is available and that the parents are aware of their child's limitations.

1.22 Trainable Mentally Handicapped

1. Physical Condition

   a) Be able to hear spoken connected language and be able to see well enough to engage in special class activities without undue risk.

   b) Be ambulatory to the extent that no undue risk to himself or hazard to others is involved in his daily work and play activities.

   c) Be trained in toilet habits so that he has control over his body functions to the extent that it is feasible to keep him in school.

2. Mental, Emotional and Social Conditions

   a) Be able to communicate to the extent that he can make his wants known and understand simple directions.

   b) Be developed socially to the extent that his behavior does not endanger himself and the physical well-being of other members of the group.

   c) Be emotionally stable to the extent that group stimulation will not intensify his problems unduly, that he can react to learning situations, and that his presence is not inimicable to the welfare of other children.

1.23 Educationally Handicapped

Eligibility of pupils for special services in the Program for the Educationally Handicapped is delineated by legal definition and expanded through official Rules and Regulations adopted by the State Board of Education.

The current statement of eligibility described in Education Code 6750, 6755 and 6755.2 identifies the pupil as one who "has marked learning or behavior disorders or both, associated with a neurological handicap or emotional disturbance. His disorders shall not be attributable to mental retardation. The learning or behavior disorder shall be manifest in part by specific learning disability. Such learning disabilities may include but are not limited to perceptual handicap. minimal cerebral dysfunction, dyslexia, dyscalculia, dysgraphia, school phobia, hyerkinesis or impulsivity."

The age range is from four years nine months through eighteen.

To determine potential within normal range, a school psychologist or equivalent must provide an individual assessment of each candidate. Other factors which might result in poor test performance or school achievement are studied by a qualified physician. Specialists such as pediatricians, neurologists, psychiatrists may be needed for an adequate differential diagnosis.

The medical examination provides data recording presence of a true learning disability, hyperkinesis, emotional disorder. It may also rule out other possible explanations for behavior or achievement.

The psychological assessment provides data regarding the nature, degree, extent, duration of learning or behavior disorders - along with recommendations for programming and instruction.

The school history and social data contribute information useful in determining eligibility.

Responsibility for the final determination is lodged with the Admissions and Planning Committee. The Revision of Rules and Regulations adopted in September 1969, require that the committee meet, discuss, and determine eligibility of pupils based on the studies described above. If any of the required numbers of the committee cannot be present, a written diagnostic statement and recommendation must be prepared in advance.

Required participants in the Admissions Committee are a licensed physician, (or R.N. for Learning Disability Group candidates), administrator, psychologist, teacher. Other members are included when possible. These include social workers, speech therapists, counselors.

1.3 Placement Procedures

1.31 Educable Mentally Handicapped

1. The Screening Committees review of all pertinent data - mental tests, academic achievement, developmental history, school progress - resulting in a decision of mental handicap as the reason for inability to compete.

2. Parental understanding of their child's needs and the class program planned for him.

3. Actual placement into a class will be made by the supervisor of classes for the mentally handicapped after the screening committee certifies the child as mentally handicapped and the parents understand the type of program and accept it. Placement then depends upon:

   a) Opening in classes in the pupil's area.

   b) Ability of the pupil to travel to and from the class by public transportation.

   c) Appropriateness of the class for the individual pupil in regard to age, sex, emotional make-up and ethnic composition.

See pages 1-3, "Progress Report on the Study of Identification, Placement, and Re-evaluation of Minority Students in Programs for the Trainable Mentally Handicapped and Educable Mentally Handicapped," dated November 26, 1969.

1.32 Trainable Mentally Handicapped

1. As in the EMH review, the screening committee decides if the child is trainable mentally retarded after reviewing mental test results, developmental history, parent report of the child to the social worker and all other pertinent data.

2. Parental understanding of their child's limitations and acceptance of the program.

3. Actual placement is made on:

    a) Existing openings at the appropriate age level.

    b) Ability of the individual child to fit into the existing opening socially and emotionally.

    c) The ability of the child to travel by the chartered bus, to eat in school and to adjust to yard participation.

1.33 Educationally Handicapped

When a pupil is declared eligible for the EH Program, the Admissions and Planning Committee determines which of the various services are most appropriate: (1) self-contained class, (2) learning disability group, or (3) home teaching. In addition to these program alternatives, the San Francisco Unified School District has a wide range of public and private agencies which might be utilized. Procedures, then, are determined by which of the programs are selected, and within which public or private agency.

In all cases, the diagnostic data and basic recommendations of the Admissions and Planning Committee are made available to the school or agencies nominated to receive the pupil.

Specific steps in placing pupils in San Francisco Unified School District units are as follows:

1. Supervisor of EH Program maintains waiting list of all eligible pupils.

2. Case worker for pupil maintains complete file for reference and interpretation.
3. Supervisor of EH examines potential placements as recommended by the Admissions and Planning Committee.
4. Supervisor contacts principal to confirm presence of opening.
5. If placement can be made, the supervisor contacts the principal who assumes responsibility for notifying parents.
6. Parents are requested to make an appointment with receiving principal at their mutual convenience. Enrollment terms are agreed upon during the interview.
7. The Waldie Report is sent to the receiving school for the EH teacher and principal or others to read prior to actual placement.
8. The pupil enrolls at the time and day agreed upon between the parent and receiving school. Full or part day, integration, and other issues are resolved prior to placement.
9. A "Change of Enrollment" form is sent to the EH office by the receiving teacher, indicating date of transfer and from what former placement.

Agency Placements

Agency placements differ according to the individual agency's policies, purposes, service range and scope. For example, several of the agencies are operated by the San Francisco Archdiocese and serve pupils placed by court order. These include University Mound, San Francisco Boys' Home, Mount St. Joseph.

In these agencies, the students are recommended for the EH program and are declared eligible through the usual procedures. However, since the agency receives pupils by court order, extensive records are in their files. No social work or psychological services are required in making the placement. The receiving agency sends for former school records as needed.

When the Admissions Committee finds the candidate to be eligible - based on data provided through the agency - placement in the EH Program at the agency is approved. No further steps are required.

In private agencies, such as Edgewood, San Francisco Children's Center, Homewood Terrace, or in public agencies such as Langley Porter, University of California Reading Center, Children's Hospital, social work assistance from the Unified School District may be required to effect an orderly placement. However, a few pupils in the in-patient programs come from families residing outside the San Francisco City and County School District. Transfer of previous school records and social work responsibilities are managed by the sending school district.

#6. Approximately what percentage of children, by race, transferred out of EMR classes into regular programs during the last two school years? EH classes?

6.1 Elementary

6.11 EMR 68-69 To regular classes

		% of Those Transferred	% of # Enrolled by Race
Negro	34	65%	12%
Spanish Surname	10	20%	12%
Other White	6	12%	9%
Chinese	2	3%	4%
	52	100%	

6.12 EMR 69-70 To regular classes

		% of Those Transferred	% of # Enrolled by Race
Negro	42	57%	15%
Spanish Surname	18	25%	23%
Other White	6	8%	10%
Chinese	5	7%	10%
Filipino	1	1%	
Other Non-White	2	2%	
	74	100%	

6.2 Junior High

6.21 1968-69 To regular classes

		% of Those Transferred	% of # Enrolled by Race
Negro	9	43%	2%
Spanish Surname	3	14%	3%
Other White	7	33%	10%
Oriental	2	10%	6%
	21		

6.22 1969-70

		% of Those Transferred	% of # Enrolled by Race
Negro	18	54%	4%
Spanish Surname	2	7%	2%
Other White	10	30%	14%
Oriental	3	9%	10%
	33		

6.3 Senior High

6.31 1968-69 To regular classes

		% of Those Transferred	% of # Enrolled by Race
Negro	8	73%	4%
Spanish Surname	0		
Other White	2	18%	2%
Oriental	1	9%	3%
	11		

6.32 1969-70

		% of Those Transferred	% of # Enrolled by Race
Negro	10	53%	5%
Spanish Surname	1	5%	1%
Other White	6	30%	6%
Oriental	2	12%	7%
	19		

6.4 Total

6.41 68-69

		% of Those Transferred	% of # Enrolled by Race
Negro	51	61%	6%
Spanish Surname	13	15%	4%
Other White	15	17%	4%
Oriental	5	7%	4%
	84		

6.42 69-70

		% of Those Transferred	% of # Enrolled by Race
Negro	70	56%	8%
Spanish Surname	21	17%	7%
Other White	22	18%	8%
Oriental	11	9%	10%
	124		

6.5 EH Classes

As has been indicated previously, the EH program is one which leads all participants back to the regular program so that definitive data in the same sense as for EMR is not readily available and perhaps not pertinent. In addition, identification by race has not been part of the record keeping. However, this data is being collected as validly as possible and a report will be forwarded when available.

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April 17, 1970

MEMORANDUM

TO: Dr. Zuretti L. Goosby, Dr. Laurel E. Glass
Members, Board Committee on Special Education

FROM: Martin J. Dean, Assistant Superintendent
Special Educational Services
Alice C. Henry, Director, Pupil Services
Richard C. Robbins, Director, Special Education

SUBJECT: Completion of Response to Questions submitted March 4
and Response to Questions submitted April 1, 1970

The attached material completes answers to questions originally submitted March 4 by the Association of Black Psychologists, the California Rural Legal Assistance Foundation and the San Francisco Neighborhood Legal Assistance Foundation, and answers questions submitted on April 1 by the San Francisco Neighborhood Legal Assistance Foundation.

As we had agreed, we are forwarding these answers immediately to allow adequate time for study prior to the next scheduled meeting on this subject, April 29, 1970.

MJD:RCR:hj

Question 9. What is the average length of time that children in the EMR program remain in that program? EH?

EMR - Since this has not been a "catch up" program, the object is for the children to remain in the program from time of placement until graduation from senior high school. Generally, children do remain for this length of time unless the family moves to an area of the city which has no class and the child can't get to an area where a class is located. (No transportation is provided for EMR.)

As previously reported, there are some children who are returned to the regular classes as a result of the reevaluation process which has always been a part of the program. These are children generally who were functioning at a retarded level when placed but who have demonstrated in the program that they can now function in the regular classes.

EH - Average length of time a child is in the EH program before he returns to regular or transfers to another special program is 18 months. There are a number of severely emotionally disturbed children who necessarily remain in the program for an extended period of time.

II D., E.

SPECIAL EDUCATION

Model and Massachusetts Special Education Regulations available upon request from the Center for Law and Education. See also P.A.R.C. orders, supra, for regulations of "special" assignment, prior evaluation, etc.

Model Special Education Bill available upon request from the Center for Law and Education.

OTHER CLASSIFICATION PRACTICES

III. Other Classification Practices: Tracking & Race A. 1.

CEI

Ability Grouping: 1970

Status, Impact, and Alternatives

WARREN G. FINDLEY
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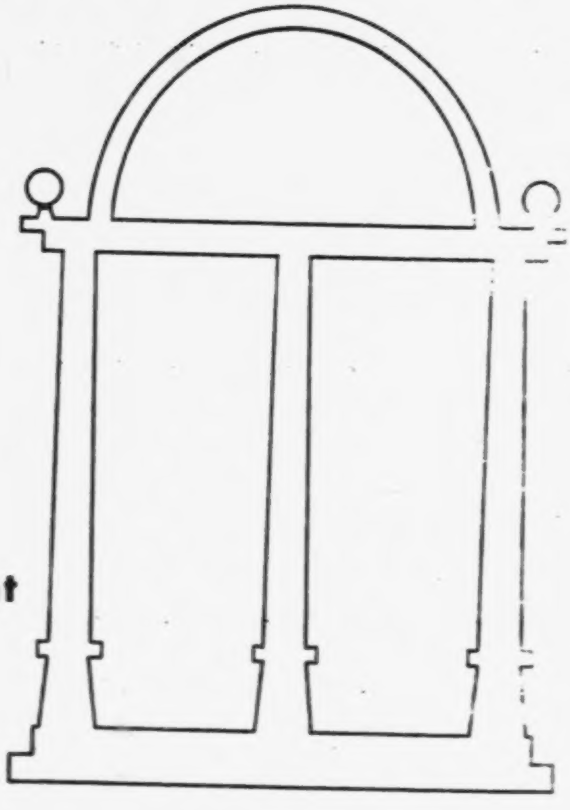

Other Classification Practices:
Tracking and Race

HIGHLIGHTS—CONCLUSIONS AND RECOMMENDATIONS

This is a summary in non-technical language of selected information in the supporting sections. It summarizes them in a sequential series of statements that follow. If these are read in sequence, they form a logical argument or brief in support of the recommendations.

A few preliminary statements will help make the meaning of the conclusions clearer. Conclusions are to be read in the light of the general notion that effects are more favorable or less damaging as one progresses from situation D1 to situation D4 defined below.

Preliminary Statements

A. As used here, ability grouping is the practice of organizing *classroom groups* in a graded school to put together children of a given age and grade who have most nearly the same standing on measures or judgments of learning achievement or capability.

B. Grouping and regrouping *within a classroom* for instruction in particular subjects is an accepted and commended instructional practice. It is *not* to be considered ability grouping in the sense in which that term is used here.

C. Ability grouping may be based on a single test, on teacher judgment, or on a composite of several tests and or judgments.

D. Ability grouping in a school district may take one of several forms, but chiefly one of four varieties:

1. Ability grouping of children in all school activities on the same basis.

2. Ability grouping for all learning of basic skills and knowledge on the same basis, but association with the generality of children of the same age in physical education and recreation.

3. Ability grouping for learning of basic *academic* skills and knowledge on the same basis, but association with the generality of children of the same grade in less academic activities, including physical education, art, music, and dramatics.

4. Ability grouping for learning of individual subjects or related subjects on different bases related to progress in mastering the different areas (for example, language arts · mathematics), but association with the generality of children of the same grade in non-academic areas. This has sometimes been referred to as "achievement grouping."

E. Ability grouping in the first grades, usually the first six or eight grades, is generally by assignment to single classroom teachers for instruction in most subjects.

F. Ability grouping in the last grades, usually in junior and senior high school, is generally by assignment *within* programs of study (college preparatory, commercial, vocational, general).

G. At high school, assignment to a curriculum or program of study may be made a part of a total ability grouping program. On the other hand, ability grouping is often accomplished to a degree by a process of self-selection in which individual students choose their programs of study freely or with some regard to prerequisites. In essential respects, the difference between the two methods is analogous to the distinction between *de jure* and *de facto* segregation.

H. Ability grouping practices differ in the degree to which reclassification or reassignment is provided for. Practices vary from virtually no review to systematic review at specified intervals of years or more often.

I. Ability grouping may be limited to provision for extreme groups.

J. Special education for mentally retarded children is to be distinguished from general ability grouping, but needs to be considered a special case subject to examination and report here.

K. Provision of advanced subjects for limited numbers of superior students is to be distinguished from ability grouping applied to all students of a grade group, but needs to be considered a special case subject to examination and report here.

Conclusions

1. Ability grouping is widely practiced in American school systems.

2. Ability grouping is especially characteristic of larger school systems.

3. Ability grouping is more common in higher grades than in earlier grades.

4. Homogeneous grouping by ability across the subjects of the school curriculum is impossible. Groups homogeneous in one field or sub-field will prove heterogeneous in other fields. Thus, children grouped by reading score or "intelligence" will overlap considerably in mathematics achievement.

5. Ability grouping is widely approved by school teachers and administrators.

6. Although unqualified approval of ability grouping is widespread among teachers, disproportionate numbers express preference for teaching mixed, average, or superior classroom groups over teaching lower-achieving groups.

7. Substantial educational research on streaming

(homogeneous grouping) in England's schools indicates that the most detrimental effect is caused by assigning "prostreaming" teachers to "non-streamed" classes. The generalization also applies to American schools.

8. Socioeconomic and social class differences are increased by streaming, reduced by non-streaming.

9. Virtually all ability grouping plans depend on tests of aptitude or achievement as an integral feature.

10. Ability grouping, as practiced, produces conflicting evidence of usefulness in promoting improved scholastic achievement in superior groups, and almost uniformly unfavorable evidence for promoting scholastic achievement in average or low-achieving groups. Put another way, some studies offer positive evidence of effectiveness of ability grouping in promoting scholastic achievement in high-achieving groups; studies seldom show improved achievement in average or low-achieving groups.

11. The effect of ability grouping on the affective development of children is to reinforce (inflate?) favorable self-concepts of those assigned to high achievement groups, but also to reinforce unfavorable self-concepts in those assigned to low achievement groups.

12. Low self-concept operates against motivation for scholastic achievement in all individuals, but especially among those from lower socioeconomic backgrounds and minority groups.

13. Children from unfavorable socioeconomic backgrounds tend to score lower on tests and to be judged less accomplished by teachers than children from middle-class homes. This discrepancy is more marked as children grow older and approach adulthood.

14. The effect of grouping procedures is generally to put low achievers of all sorts together and deprive them of the stimulation of middle-class children as learning models and helpers.

15. Low achievers include many disruptive children who have failed to acquire constructive school attitudes as well as children with low and slow achievement patterns.

16. Children of many minority groups (Negro, Puerto Rican, Mexican-American, Indian American) come disproportionately from lower socioeconomic backgrounds.

17. The source of disadvantage for some minority groups (Puerto Rican, Mexican-American, Indian American) derives in part from the fact that teaching and testing in schools are usually entirely in English, which for them is a "second" language.

18. The language patterns of black and white children from lower socioeconomic backgrounds often differ so markedly from "standard American" as to make schooling in most schools involve language disability by such language standards. This circumstance has not only the direct effect of making learning more difficult. Indirect effects are also produced via lowered self-concept because of frequent corrections.

19. A fundamental generalization is that differences in socioeconomic backgrounds result in cumulative effects because of early acquired differences in ability to interact profitably with teachers who have middle-class habits and values. Middle-class children come to school prepared to respond to approval by teachers for their prior learning and readiness to respond. Disadvantaged children, especially boys, often have to unlearn assertive, unresponsive behavior in order to participate in a teaching-learning rapport in the classroom.

20. Desegregated classes have greatest positive impact on school learning of socioeconomically disadvantaged children when the proportion of middle-class children in the group is highest. Conversely, when socioeconomically disadvantaged children are in the majority in a class, the effect of grouping is commonly to produce poorer achievement on their part.

21. Assignment to low achievement groups carries a stigma that is generally more debilitating than relatively poor achievement in heterogeneous groups.

22. A positive dynamic of all instructional programs is constructive stimulation, what J. McV. Hunt calls "the problem of the match"—some stimulation, but not too much, accompanied by supportive encouragement.

23. Formal education, or instruction, makes a difference in ultimate adult capability. How much difference education makes in comparison with other factors is a separate question which is essentially irrelevant.

24. Ability grouping practices are to be distinguished from each other in terms of their underlying strategies for dealing with initial differences among children and the cumulative effect of such differences.

25. Different ability grouping practices show different amounts of differential treatment given to different children after ability grouping has been done. The teaching strategies employed with those classified low often deny stimulation offered to those classified high on the criterion used in grouping. Elsewhere, all those classified in one group are thereafter taught as if almost identical in capability.

26. Of the patterns of ability grouping differentiated in Preliminary Statement D, type D4 generally involves more detailed diagnosis and specific instructional differentiation.

27. There are viable alternatives to ability grouping as means of furthering school learning, including

stratified heterogeneous grouping, tutoring, team teaching, and individually programed instruction.

28. Planned heterogeneous grouping—notably the Baltimore plan of stratified heterogeneous grouping by tens—takes into account simultaneously the concern for curtailing extreme heterogeneity, while assuring enough diversity to give leadership opportunities in each class, providing thereby for stimulation of the less advanced by these leaders, and avoiding the concentration of defeated and stigmatized children in a bottom group almost impossible to inspire or teach.

29. Where older children, themselves academically retarded, are paid to tutor younger children who are having difficulty in learning to read in the elementary grades, both groups gain substantially. In fact, the older children gain even more than the younger ones being tutored. Similar findings apply to writing.

30. Teaching by teams of teachers with different responsibilities, under the leadership of coordinating master teachers, is a fundamental pattern in plans developed for training future elementary school teachers. Departmentalization of instruction may be considered a step in this direction.

31. Individualized instruction by prescription of sequences of learning experiences has been worked out for much of the learning of basic skills and structured knowledge.

32. All four of the above teaching-learning practices can be applied simultaneously. They are mutually compatible.

33. Early childhood education, whether designed to be compensatory or for all children, presents a further supplementary approach.

34. Residential segregation, in the form of concentrations of minority groups in cities and the moving of majority groups to suburbs, plus the organization of private schools along ethnic lines, makes ethnic desegregation within many large cities almost meaningless.

35. The same may be said to a lesser degree of socioeconomic segregation without regard to ethnic distinctions.

36. Ability grouping of the types described in Preliminary Statements D1—D3 has generally undesirable effects on learning and self-concept within like ethnic and socioeconomic groups, which are magnified when the correlated factors of ethnicity and socioeconomic status are involved.

37. Findings of the impact of ability grouping on classroom groups have implications for residential segregation and schooling tied to it. The issues underlying ability grouping and school desegregation are deeply embedded in our society and its culture. The matters reported here are integral parts of a larger social pattern, contributing to the perpetuation or change of that pattern, but largely determined by it.

Recommendations

1. Ability grouping of the types described in Preliminary Statements D1, D2, and D3 should not be used.

2. Ability grouping of the types described in Preliminary Statement D4 may be used to advantage where the information gained by testing and/or observation is the first step in a program of diagnosis and individualized instruction.

3. Provision should be made for frequent review of each individual's grouping status as part of the instructional program.

4. Tutoring, team teaching, individually programed instruction, and early childhood education should be explored and exploited for their usefulness in promoting learning.

5. The personality dynamics of the tutoring of younger children by older children, often of modest ability, should be explored and exploited.

6. Heterogeneous grouping, in a classroom atmosphere of cooperation and helping, should be the rule except as indicated under Recommendation 2.

7. Stratified heterogeneous grouping by tens, as practiced in Baltimore, should be utilized and refined.

8. Favorable self-concept should be a goal in itself, but it is also a supportive factor in learning. An attitude of firm confidence and hope by the teacher is fundamental. Techniques for conveying such an attitude can be learned.

9. Teacher training should include an emphasis on welcoming diversity in children, and teaching children to prize it in each other. A particularly important aspect of such diversity is with regard to language and customs of minority groups. Teachers therefore need pre-service and/or in-service preparation in language habits and cultural heritages of minority groups to use as the basis for positive acceptance of all kinds of children into the classroom group.

10. Steps should be taken *as early as possible* in each local situation to promote unitary school populations in each district and each classroom. When a district or city has become almost completely a socioeconomically limited population, the possibility of effective desegregation and its constructive impact virtually disappears.

A. 2.

Margaret M. JOHNSON et al., Plaintiffs-Appellants,

v.

JACKSON PARISH SCHOOL BOARD et al., Defendants-Appellees.

No. 28712.

United States Court of Appeals,
Fifth Circuit.

March 25, 1970.

Proceedings on motion to clarify or supplement mandate, 420 F.2d 692. The Court of Appeals held that where school board technically desegregated schools but maintained dual system of classes within school, prior mandate directing school desegregation would be amended to require school board to forthwith eliminate dual system of pupil attendance by integrating all black and predominately all white classes within schools, except in those cases where class is continuation of course only offered in all black or all white school.

Mandate modified.

1. Schools and School Districts ⇐13

There must be elimination of no only segregated schools but also segregated classes within schools.

2. Schools and School Districts ⇐13

Where school board technically desegregated schools but maintained dual system of classes within schools, prior mandate directing school desegregation would be amended to require school board to forthwith eliminate dual system of pupil attendance by integrating all black and predominately all white classes within schools, except in those cases where class is continuation of course only offered in all black or all white school.

George M. Strickler, Jr., Collins, Douglas & Elie, New Orleans, La., Richard B. Sobol, Washington, D. C., Jesse Queen, Civil Rights Div., U. S. Dept. of Justice, Washington, D. C., for appellants.

Hal R. Henderson, Dist Atty., Second Judicial Dist., Arcadia, La., Fred L. Jackson, Asst. Dist. Atty., Second Judicial Dist., Homer, La., Albin P. Lassiter, Dist. Atty., Fourth Judicial Dist., Monroe, La., John F. Ward, Baton Rouge, La., William H. Baker, Special Counsel, Jonesboro, La., for appellees.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

When this desegregation case was before us on December 9, 1969, we granted appellants' motion for summary reversal of an order of the District Court for the Western District of Louisiana and remanded for compliance with the requirements of Alexander, et al. v. Holmes County, 1969, 396 U.S. 19, 90 S. Ct. 29, 24 L.Ed.2d 19, and the terms, provisions and conditions (including the times specified) in Singleton et al. v. Jackson Municipal Separate School District, 5 Cir. 1969, 419 F.2d 1211, 420 F.2d 692. The Supreme Court ordered in *Alexander* "that * * * school districts here involved may no longer operate a dual school system based on race or color, and direct[ed] that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." *Singleton* required that full faculty integration be accomplished by February 1, 1970, but postponed pupil desegration until September, 1970. On January 14, 1970, the Supreme Court reversed *Singleton* insofar as it deferred student desegregation beyond February 1, 1970, Carter et al. v. West Feliciana Parish et al., 1970, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477. Accordingly, on January 26, 1970, this court, acting on appellants' supplemental petition for rehearing adopted the *Carter* schedule for student desegregation in this case, 420 F.2d 693. The case is now before us on appellants' motion to clarify or supplement our mandates of December 9, 1969, and January 26, 1970, to specify that the Jackson Parish School Board immediately terminate its system of segregating students by color in classrooms within an "integrated school."

On January 27, 1970, the District Court entered a decree approving a desegregation plan submitted by the school board. The plan called for the closing of three previously all-Negro schools and a combination of "pairing" and geographic zoning to assure the integration of the remaining schools. No mention was made either in the plan or the order as to the manner in which students were to be assigned to classes within the schools.

The Board technically desegregated the schools. However, the Board has maintained a dual system of classes within the schools. In grades one through seven the classes remain intact with the same teachers that taught the pupils in the first semester. Thus all-Negro classes from the closed Negro schools with Negro teachers now exist in the purportedly integrated schools. Except for a few Negro students who formerly attended white schools under freedom-of-choice, classes from these schools remain all white. Furthermore, in at least one instance, the first and second grades from an all-Negro school were consolidated under one Negro teacher in the same classroom rather than combining the second-grade Negro students with their white counterparts.

[1, 2] We think that it was manifestly clear that the decisions of the Supreme Court and this Court required the elimination of not only segregated schools, but also segregated classes within the schools. Nevertheless, to avoid further equivocation, our mandates of December 9, 1969, and January 26, 1970, 420 F.2d 692, are amended to require that the Jackson Parish School Board shall forthwith eliminate the dual system of pupil attendance by integrating all black and predominantly all white classes within the schools, except in those cases where a class is a continuation of a course only offered in an all black or all white school.

A.3.

Ura Bernard LEMON et al., Plaintiffs-Appellants,

United States of America, Plaintiff-Intervenor,

v.

BOSSIER PARISH SCHOOL BOARD et al., Defendants-Appellees.

No. 30447.

United States Court of Appeals,
Fifth Circuit.
June 17, 1971.

School desegregation case. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., J., approved school board plan for operation of schools, and plaintiffs appealed. The Court of Appeals held that school district which operated as unitary system for only one semester could not assign students to schools within district on basis of achievement test scores.

Vacated and remanded with direction.

1. Schools and School Districts 🔑154

School district which operated as unitary system for only one semester could not assign students to schools within district on basis of achievement test scores.

2. Schools and School Districts 🔑154

Formerly segregated school district must operate as unitary system for se eral years before students may be assigned within system on basis of achievement test scores.

Jesse N. Stone, Jr., Shreveport, La., Norman J. Chachkin, Margrett Ford, New York City, A. P. Tureaud, New Orleans, La., for plaintiffs-appellants.

J. Bennett Johnston, Jr., Shreveport, La., Edward S. Christenbury, Civil Rights Div., U. S. Dept. of Justice, Washington, D. C., Arthur M. Wallace, Jr., Asst. Dist. Atty., Benton, La., for defendants-appellees.

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM:

This is an appeal from an order of the district court approving a school board plan for the operation of the public schools in Plain Dealing, Louisiana. The plan in question provides that students in grades 4–12 will be assigned to one of the two schools in the system on the basis of scores made on the California Achievement Test. Plaintiffs appeal, contesting the validity of the board's plan.

[1] We think it obvious that the plan approved by the district court, insofar as it provides for the assignment of students on the basis of achievement test scores, is not in compliance with previous orders of this court in school desegregation cases. In Singleton v. Jackson Municipal Separate School District, 5 Cir. 1969, 419 F.2d 1211, rev. in part on other grounds, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477, this court sitting en banc said:

> "This suit seeks to desegregate two school districts, Marshall County and Holly Springs, Mississippi. The district court approved plans which would assign students to schools on the basis of achievement test scores. We pretermit a discussion of the validity per se of a plan based on testing except to hold that testing cannot be employed in any event until unitary school systems have been established." 419 F.2d at 1219.

[2] Since *Singleton* we have repeatedly rejected testing as a basis for student assignments. United States v. Sunflower County School District, 5 Cir. 1970, 430 F.2d 839; United States v. Tunica County School District, 5 Cir. 1970, 421 F.2d 1236, and we see no occasion to depart from this rule in the present case. The Plain Dealing School System has been a unitary system for only one semester. This is insufficient to even raise the issue of the validity of testing itself. In *Singleton* we made it clear that regardless of the innate validity of testing, it could not be used until a school district had been established as a unitary system. We think at a minimum this means that the district in question must have for several years operated as a unitary system. The Plain Dealing district does not meet this standard since it operated as a unitary system for only one semester. "One swallow does not make a spring." For this reason the district must discontinue assigning students on the basis of achievement test scores.

We decline once again, however, the invitation to rule on the validity of testing per se. When a school district that has operated as a unitary system for a sufficient time raises the issue, we will then decide that complex and troubling question which, suffice it to say, is not simplistic.

For the foregoing reasons, the judgment of the district court as it relates to student assignment is vacated, and the cause is remanded with direction that the district court require the school board to constitute and implement a student assignment plan by July 15, 1971, that complies with this opinion and the principles established in Swann v. Charlotte-Mecklenburg Board of Education, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554. In the event that the school board fails to develop such a plan by July 15, 1971, the district court shall order that the pairing plan contained in its January 17, 1970, order shall be reinstituted and shall remain in effect until such time as the school board does provide a student assignment plan in compliance with this court's order to disestablish the dual school system in Plain Dealing, Louisiana. In addition, the district court shall require the school board to file semi-annual reports during the school year similar to those required in United States v. Hinds County School Board, 5 Cir. 1970, 433 F.2d 611, 618–619.

The mandate in this cause shall issue forthwith. No stay will be granted pending petition for rehearing or application for writ of certiorari.

Vacated and remanded with direction.

Other Classification Practices: Tracking and Race

A.4.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 3259

FREDDIE M. SINGLETON, et al, Plaintiffs,)
)
and)
)
THE UNITED STATES OF AMERICA,)
)
Plaintiff-Intervenor,)
)
-vs-)
)
ANSON COUNTY BOARD OF EDUCATION, a)
public body corporate,)
)
Defendants.)

This case was heard on June 1, 1971, upon the motion of th
United States for supplemental relief filed March 19, 1971, upon
motion of the individual plantiffs for further relief filed April
1971, and upon the amended motion of the United States for supple
relief filed on June 1, 1971.

In conformity with constitutional principles established i
various decisions and set out in some detail in the recent Suprem
Court decision in Swann, et al., v. Charlotte-Mecklenburg Board o
Education (39 LW 4437, ____ U.S. ____, April 20, 1971), the follo
orders are made:

1. As to faculty assignment the defendants are directed
comply with the original order of Judge Jones for desegregation o
the school faculties by apportioning teachers among the various
schools so that each school at each level of education will have
approximately the same proportion of black teachers as there are
teachers in the system, and approximately the same proportion of
white teachers as there are white teachers in the system.

2. The location, construction and enlargement or improve-
ments of schools (including mobile classrooms) will be planned so

that they tend to reduce rather than to increase segregation.

3. Assignment of teachers and other employees to schools the fall of 1971 and thereafter shall be managed in such a way t to the extent possible the competence and experience of facultie other employees at the various schools will be approximately equ and that assignments and compensation of faculty and other perso not be racially discriminatory.

4. Administrative transfers by the Board under its statu power and duty to assign pupils shall be made, if made at all, i racially non-discriminatory fashion and shall not be allowed or if the overall result of such transfers is to restore or increas any substantial degree the extent of segregation in either the t ferer or the transferee school.

5. There shall be no racial discrimination in the employ discharge, promotion, compensation and assignment of teachers an other staff members nor in any of their other emoluments and duti

6. In-school segregation. It appears from the evidence t numerous classrooms in the Anson County schools are all black. Th number may be as high as 25 or 30 out of 155. Several of these a all black because of "ability grouping", several are all black be of the eligibility requirements under the ESEA (Elementary and Secondary Education Act) regulations; and some may be all black because of academic retardation of the students.

The reasons for having these classes segregated do not ext throughout the entire school day. The fact that certain children belong, for example, to ESEA classes for part of the day is no justification for maintaining separation within the school for th rest of the day's work. Even the "ability grouping" as to academ matters generally would not appear to require the segregation of

academically deficient children for the entire day of their
experience. Ability groupings or the so-called "track metho
have academic justification and may be an educational rather
constitutional issue, but the track system or "ability group
suspect when it first begins to flourish on the eve of or du
desegregation suit. Therefore, the defendants are directed
allow in-school separation because of ability groupings, ESE
lines or other such justification except for the portion of
academic day which those ad hoc classes require, and not to
children involved in those classes separated for the rest of

The defendants are instructed to report to the court
August 15, 1971, on the plan of operation for the fall of 19
reference to this subject of in-school segregation, and the
which the plan thus modified will produce.

7. Several items covered by the various motions are
for future hearing, if necessary. Those include, among othe
following:

(a) Matters regarding the details of school con
enlargement and location.

(b) The plaintiffs' contentions that new teache
other staff members should be chosen so as to maintai
approximate number or proportion of black employees t
system had in it on some particular date.

(c) Contentions which would require proof that
been racial discrimination against particular teacher

(d) The question whether the old school at Polk
sold to a local fire department, might now be allowed
as a private school.

(e) Matters dealing with costs and attorneys' fees.

8. It is expected that the defendants will operate their schools starting with the fall of 1971 and thereafter on essentially the principles set out in the Swann case, to which reference is again made.

This the 22nd day of June, 1971.

/s/ James R. McMillan
James B. McMillan
United States District Judge

OTHER CLASSIFICATION PRACTICES

A. Race: Griggs v. Duke Power Co., 91 S.Ct. 849 (1971)

6 Singleton v. Jackson, 419 F.2d 1211, 1219 (5th Cir. 1970) (en banc)

7 Jackson v. Marvell School District No. 22, 425 F.2d 211 (8th Cir. 1970)

8 U.S. v. Sunflower County, 430 F.2d 839 (5th Cir. 1970)

9 Moses v. Washington Parish School Board, 330 F.Supp. 1340 (E.D. La. 1971)

10 Simkins v. Consolidated School District of Aiken County, C.A. No. 71-784 (D. S.C.) (August, 1971). Papers available from Clearinghouse (#7431)

11 Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), 327 F.Supp. 844 (D.D.C. 1971)

B. National Origin and Language Discrimination:

1 Ruiz v. State Bd. of Ed., No. 218294 (Superior Court for County of Sacramento, Cal., filed Dec. 16, 1971). Testing and language discrimination. Papers available at Clearinghouse and in "Bilingual Packet" from Center for Law and Education.(CH #7428)

2 Memoranda from H.E.W.

Edwin Yourman, Assistant General Counsel (Civil Rights), "Legal Basis for Proposed Memorandum to Local School Districts Regarding National Origin Discrimination" (April 10, 1970) (CH #7429)

J. Stanley Pottinger, Director (Civil Rights), "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 27, 1970) (CH #7430)

Available from Clearinghouse and in "Bilingual Packet" from Center for Law and Education.

3 Lau v. Nichols, No. 26155 (on appeal in 9th Cir.)(Affirmative obligation). Papers available at Clearinghouse and in "Bilingual Packet" from Center for Law and Education. (CH #3321)

4 Bilingual Bill and Commentary. Papers available from Clearinghouse (#6410) and in "Bilingual Packet" from Center for Law and Education.

III. C. Other Classification Practices: Within Classroom Tracking

*Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education**

Excerpts

RAY C. RIST
Washington University

Many studies have shown that academic achievement is highly correlated with social class. Few, however, have attempted to explain exactly how the school helps to reinforce the class structure of the society. In this article Dr. Rist reports the results of an observational study of one class of ghetto children during their kindergarten, first- and second-grade years. He shows how the kindergarten teacher placed the children in reading groups which reflected the social class composition of the class, and how these groups persisted throughout the first several years of elementary school. The way in which the teacher behaved toward the different groups became an important influence on the children's achievement. Dr. Rist concludes by examining the relationship between the "caste" system of the classroom and the class system of the larger society.

A dominant aspect of the American ethos is that education is both a necessary and a desirable experience for all children. To that end, compulsory attendance at

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* This paper is based on research aided by a grant from the United States Office of Education, Grant No. 6-2771. Original Principal Investigator, Jules Henry (deceased) Professor of Anthropology, Washington University. Current Principal Investigators, Helen P. Gouldner, Professor of Sociology, Washington University, and John W. Bennett, Professor of Anthropology, Washington University. The author is grateful for substantive criticism and comments from John Bennett, Marshal Durbin and Helen Gouldner on an earlier draft of this paper.

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some type of educational institution is required of all youth until somewhere in the middle teens. Thus on any weekday during the school year, one can expect slightly over 35,000,000 young persons to be distributed among nearly 1,100,000 classrooms throughout the nation (Jackson, 1968).

There is nothing either new or startling in the statement that there exist gross variations in the educational experience of the children involved. The scope of analysis one utilizes in examining these educational variations will reveal different variables of importance. There appear to be at least three levels at which analysis is warranted. The first is a macro-analysis of structural relationships where governmental regulations, federal, state, and local tax support, and the presence or absence of organized political and religious pressure all affect the classroom experience. At this level, study of the policies and politics of the Board of Education within the community is also relevant. The milieu of a particular school appears to be the second area of analysis in which one may examine facilities, pupil-teacher ratios, racial and cultural composition of the faculty and students, community and parental involvement, faculty relationships, the role of the principal, supportive services such as medical care, speech therapy, and library facilities—all of which may have a direct impact on the quality as well as the quantity of education a child receives.

Analysis of an individual classroom and the activities and interactions of a specific group of children with a single teacher is the third level at which there may be profitable analysis of the variations in the educational experience. Such micro-analysis could seek to examine the social organization of the class, the development of norms governing interpersonal behavior, and the variety of roles that both the teacher and students assume. It is on this third level—that of the individual classroom—that this study will focus. Teacher-student relationships and the dynamics of interaction between the teacher and students are far from uniform. For any child within the classroom, variations in the experience of success or failure, praise or ridicule, freedom or control, creativity or docility, comprehension or mystification may ultimately have significance far beyond the boundaries of the classroom situation (Henry, 1955, 1959, 1963).

It is the purpose of this paper to explore what is generally regarded as a crucial aspect of the classroom experience for the children involved—the process whereby expectations and social interactions give rise to the social organization of the class. There occurs within the classroom a social process whereby, out of a large group of children and an adult unknown to one another prior to the beginning of the school year, there emerge patterns of behavior, expectations of performance, and a mutually accepted stratification system delineating those doing well from those doing poorly. Of particular concern will be the relation of the teacher's expectations of potential academic performance to the social status of the student. Emphasis will be placed on the initial presuppositions of the teacher regarding the intellectual ability of certain groups of children and their consequences for the children's socialization into the school system. A major goal of this analysis is to ascertain the importance of the initial expectations of the teacher in relation to the child's chances for success or failure within the public school system. (For previous studies of the significance of student social status to variations in educational experience, cf. Becker, 1952; Hollingshead, 1949; Lynd, 1937; Warner, *et al.*, 1944).

Increasingly, with the concern over intellectual growth of children and the long and close association that children experience with a series of teachers, attention is centering on the role of the teacher within the classroom (Sigel, 1969). A long series of studies have been conducted to determine what effects on children a teacher's values, beliefs, attitudes, and, most crucial to this analysis, a teacher's expectations may have. Asbell (1963), Becker (1952), Clark (1963), Gibson 1965), Harlem Youth Opportunities Unlimited (1964), Katz (1964), Kvaraceus (1965), MacKinnon (1962), Riessman (1962, 1965), Rose (1956), Rosenthal and Jacobson (1968), and Wilson (1963) have all noted that the teacher's expectations of a pupil's academic performance may, in fact, have a strong influence on the actual performance of that pupil. These authors have sought to validate a type of educational self-fulfilling prophecy: if the teacher expects high performance, she receives it, and vice versa. A major criticism that can be directed at much of the research is that although the studies may establish that a teacher has differential expectations and that these influence performance for various pupils, they have not elucidated either the basis upon which such differential expectations are formed or how they are directly manifested within the classroom milieu. It is a goal of this paper to provide an analysis both of the factors that are critical in the teacher's development of expectations for various groups of her pupils and of the process by which such expectations influence the classroom experience for the teacher and the students.

The basic position to be presented in this paper is that the development of expectations by the kindergarten teacher as to the differential academic potential and capability of any student was significantly determined by a series of subjectively interpreted attributes and characteristics of that student. The argument may be succinctly stated in five propositions. First, the kindergarten teacher possessed a roughly constructed "ideal type" as to what characteristics were necessary for any given student to achieve "success" both in the public school and in the larger society. These characteristics appeared to be, in significant part, related to social class criteria. Secondly, upon first meeting her students at the beginning of the school year, subjective evaluations were made of the students as to possession or absence of the desired traits necessary for anticipated "success." On the basis of the evaluation, the class was divided into groups expected to succeed (termed by the teacher "fast learners") and those anticipated to fail (termed "slow learners"). Third, differential treatment was accorded to the two groups in the classroom, with the group designated as "fast learners" receiving the majority of the teaching time, reward-directed behavior, and attention from the teacher. Those designated as "slow learners" were taught infrequently, subjected to more frequent control-oriented behavior, and received little if any supportive behavior from the teacher. Fourth, the interactional patterns between the teacher and the various groups in her class became rigidified, taking on caste-like characteristics, during the course of the school year, with the gap in completion of academic material between the two groups widening as the school year progressed. Fifth, a similar process occurred in later years of schooling, but the teachers no longer relied on subjectively interpreted data as the basis for ascertaining differences in students. Rather, they were able to utilize a variety of informational sources related to past performance as the basis for classroom grouping.

Though the position to be argued in this paper is based on a longitudinal study spanning two and one-half years with a single group of black children, additional studies suggest that the grouping of children both between and within classrooms is a rather prevalent situation within American elementary classrooms. In a report released in 1961 by the National Education Association related to data collected during the 1958-1959 school year, an estimated 77.6% of urban school districts (cities with a population above 2500) indicated that they practiced between-classroom ability grouping in the elementary grades. In a national survey of elementary schools, Austin and Morrison (1963) found that "more than 80% reported that they 'always' or 'often' use readiness tests for pre-reading evaluation [in first grade]." These findings would suggest that within-classroom grouping may be an even more prevalent condition than between-classroom grouping. In evaluating data related to grouping within American elementary classrooms, Smith (1971, in press) concludes, "Thus group assignment on the basis of measured 'ability' or 'readiness' is an accepted and widespread practice."

Two grouping studies which bear particular mention are those by Borg (1964) and Goldberg, Passow, and Justman (1966). Lawrence (1969) summarizes the import of these two studies as "the two most carefully designed and controlled studies done concerning ability grouping during the elementary years. . . ." Two school districts in Utah, adjacent to one another and closely comparable in size, served as the setting for the study conducted by Borg. One of the two districts employed random grouping of students, providing all students with "enrichment," while the second school district adopted a group system with acceleration mechanisms present which sought to adapt curricular materials to ability level and also to enable varying rates of presentation of materials. In summarizing Borg's findings, Lawrence states:

> In general, Borg concluded that the grouping patterns had no consistent, general effects on achievement at any level. . . . Ability grouping may have motivated bright pupils to realize their achievement potential more fully, but it seemed to have little effect on the slow or average pupils. (p. 1)

The second study by Goldberg, Passow, and Justman was conducted in the New York City Public Schools and represents the most comprehensive study to date on elementary school grouping. The findings in general show results similar to those of Borg indicating that narrowing the ability range within a classroom on some basis of academic potential will in itself do little to produce positive academic change. The most significant finding of the study is that "variability in achievement from classroom to classroom was generally greater than the variability resulting from grouping pattern or pupil ability" (Lawrence, 1969). Thus one may tentatively conclude that teacher differences were at least as crucial to academic performance as were the effects of pupil ability or methods of classroom grouping. The study, however, fails to investigate within-class grouping.

Related to the issue of within-class variability are the findings of the Coleman Report (1966) which have shown achievement highly correlated with individual social class. The strong correlation present in the first grade does not decrease during the elementary years, demonstrating, in a sense, that the schools are not able effectively to close the achievement gap initially resulting from student social class (pp. 290-325). What variation the Coleman Report does find in achievement in the elementary years results largely from within- rather than between-school variations. Given that the report demonstrates that important differences in achievement do not arise from variations in facilities, curriculum, or staff, it concludes:

> One implication stands out above all: That schools bring little influence to bear on a

> child's achievement that is independent of his background and general social context; and that this very lack of independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American Schools. (p. 325)

It is the goal of this study to describe the manner in which such "inequalities imposed on children" become manifest within an urban ghetto school and the resultant differential educational experience for children from dissimilar social-class backgrounds.

Methodology

Data for this study were collected by means of twice weekly one and one-half hour observations of a single group of black children in an urban ghetto school who began kindergarten in September of 1967. Formal observations were conducted throughout the year while the children were in kindergarten and again in 1969 when these same children were in the first half of their second-grade year. The children were also visited informally four times in the classroom during their first-grade year.[1] The difference between the formal and informal observations consisted in the fact that during formal visits, a continuous handwritten account was taken of classroom interaction and activity as it occurred. Smith and Geoffrey (1968) have labeled this method of classroom observation "microethnography." The informal observations did not include the taking of notes during the classroom visit, but comments were written after the visit. Additionally, a series of interviews were conducted with both the kindergarten and the second-grade teachers. No mechanical devices were utilized to record classroom activities or interviews.

I believe it is methodologically necessary, at this point, to clarify what benefits can be derived from the detailed analysis of a single group of children. The single most apparent weakness of the vast majority of studies of urban education is that they lack any longitudinal perspective. The complexities of the interactional processes which evolve over time within classrooms cannot be discerned with a single two- or three-hour observational period.

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[1] The author, due to a teaching appointment out of the city, was unable to conduct formal observations of the children during their first-grade year.

* * *

The Teacher's Stimulus

When the kindergarten teacher made the permanent seating assignments on the eighth day of school, not only had she the above four sources of information concerning the children, but she had also had time to observe them within the classroom setting. Thus the behavior, degree and type of verbalization, dress, mannerisms, physical appearance, and performance on the early tasks assigned during class were available to her as she began to form opinions concerning the capabilities and potential of the various children. That such evaluation of the children by the teacher was beginning, I believe, there is little doubt. Within a few days, only a certain group of children were continually being called on to lead the class in the Pledge of Allegiance, read the weather calendar each day, come to the front for "show and tell" periods, take messages to the office, count the number of children present in the class, pass out materials for class projects, be in charge of equipment on the playground, and lead the class to the bathroom, library, or on a school tour. This one group of children, that continually were physically close to the teacher and had a high degree of verbal interaction with her, she placed at Table 1.

As one progressed from Table 1 to Table 2 and Table 3, there was an increasing dissimilarity between each group of children at the different tables on at least four major criteria. The first criterion appeared to be the physical appearance of the child. While the children at Table 1 were all dressed in clean clothes that were relatively new and pressed, most of the children at Table 2, and with only one exception at Table 3, were all quite poorly dressed. The clothes were old and often quite dirty. The children at Tables 2 and 3 also had a noticeably different quality and quantity of clothes to wear, especially during the winter months. Whereas the children at Table 1 would come on cold days with heavy coats and sweaters, the children at the other two tables often wore very thin spring coats and summer clothes. The single child at Table 3 who came to school quite nicely dressed came from a home in which the mother was receiving welfare funds, but was supplied with clothing for the children by the families of her brother and sister.

An additional aspect of the physical appearance of the children related to their body odor. While none of the children at Table 1 came to class with an odor of urine on them, there were two children at Table 2 and five children at Table 3 who frequently had such an odor. There was not a clear distinction among the children at the various tables as to the degree of "blackness" of their skin, but there were more children at the third table with very dark skin (five in all) than there were at the first table (three). There was also a noticeable distinction among the various groups of children as to the condition of their hair. While the three boys at Table 1 all had short hair cuts and the six girls at the same table had their hair "processed" and combed, the number of children with either matted or unprocessed hair increased at Table 2 (two boys and three girls) and eight of the children at Table 3 (four boys and four girls). None of the children in the kindergarten class wore their hair in the style of a "natural."

A second major criteria which appeared to differentiate the children at the various tables was their interactional behavior, both among themselves and with the teacher. The several children who began to develop as leaders within the class by giving directions to other members, initiating the division of the class into teams on the playground, and seeking to speak for the class to the teacher ("We want to color now"), all were placed by the teacher at Table 1. This same group of children displayed considerable ease in their interaction with her. Whereas the children at Tables 2 and 3 would often linger on the periphery of groups surrounding the teacher, the children at Table 1 most often crowded close to her.

The use of language within the classroom appeared to be the third major differentiation among the children. While the children placed at the first table were quite verbal with the teacher, the children placed at the remaining two tables spoke much less frequently with her. The children placed at the first table also displayed a greater use of Standard American English within the classroom. Whereas the children placed at the last two tables most often responded to the teacher in black dialect, the children at the first table did so very infrequently. In other words, the children at the first table were much more adept at the use of "school language" than were those at the other tables. The teacher utilized standard American English in the classroom and one group of children were able to respond in a like manner. The frequency of a "no response" to a question from the teacher was recorded at a ratio of nearly three to one for the children at the last two tables as opposed to Table 1. When questions were asked, the children who were placed at the first table most often gave a response.

The final apparent criterion by which the children at the first table were quite noticeably different from those at the other tables consisted of a series of social factors which were known to the teacher prior to her seating the children. Though it is not known to what degree she utilized this particular criterion when she assigned seats, it does contribute to developing a clear profile of the children at the various tables. Table 1 gives a summary of the distribution of the children at the three tables on a series of variables related to social and family conditions. Such variables may be considered to give indication of the relative status of the children within the room, based on the income, education and size of the family. (For a discussion of why these three variables of income, education, and family size may be considered as significant indicators of social status, cf. Frazier, 1962; Freeman, *et. al.*, 1959; Gebhard, *et al.*, 1958; Kahl, 1957; Notestein, 1953; Reissman, 1959; Rose, 1956; Simpson and Yinger, 1958.)

TABLE 1

Distribution of Socio-Economic Status Factors by Seating Arrangement at the Three Tables in the Kindergarten Classroom

Factors	*Seating Arrangement** *Table 1*	*Table 2*	*Table 3*
Income			
1) Families on welfare	0	2	4
2) Families with father employed	6	3	2
3) Families with mother employed	5	5	5
4) Families with both parents employed	5	3	2
5) Total family income below $3,000. /yr**	0	4	7
6) Total family income above $12,000. /yr**	4	0	0
Education			
1) Father ever grade school	6	3	2
2) Father ever high school	5	2	1
3) Father ever college	1	0	0
4) Mother ever grade school	9	10	8
5) Mother ever high school	7	6	5
6) Mother ever college	4	0	0
7) Children with pre-school experience	1	1	0
Family Size			
1) Families with one child	3	1	0
2) Families with six or more children	2	6	7
3) Average number of siblings in family	3-4	5-6	6-7
4) Families with both parents present	6	3	2

* There are nine children at Table 1, eleven at Table 2, and ten children at Table 3.
** Estimated from stated occupation.

Believing, as I do, that the teacher did not randomly assign the children to the various tables, it is then necessary to indicate the basis for the seating arrangement. I would contend that the teacher developed, utilizing some combination of the four criteria outlined above, a series of expectations about the potential performance of each child and then grouped the children according to perceived similarities in expected performance. The teacher herself informed me that the first table consisted of her "fast learners" while those at the last two tables "had no idea of what was going on in the classroom." What becomes crucial in this discussion is to ascertain the basis upon which the teacher developed her criteria of "fast learner" since there had been no formal testing of the children as to their academic potential or capacity for cognitive development. She made evaluative judgments of the expected capacities of the children to perform academic tasks after eight days of school.

Certain criteria became indicative of expected success and others became indicative of expected failure. Those children who closely fit the teacher's "ideal type" of the successful child were chosen for seats at Table 1. Those children that had the least "goodness of fit" with her ideal type were placed at the third table. The criteria upon which a teacher would construct her ideal type of the successful student would rest in her perception of certain attributes in the child that she believed would make for success. To understand what the teacher considered as "success," one would have to examine her perception of the larger society and whom in that larger society she perceived as successful. Thus, in the terms of Merton (1957), one may ask which was the "normative reference group" for Mrs. Caplow that she perceived as being successful.[2] I believe that the reference group utilized by Mrs. Caplow to determine what constituted success was a mixed black-white, well-educated middle class. Those attributes most desired by educated members of the middle class became the basis for her evaluation of the children. Those who possessed these particular characteristics were expected to succeed while those who did not could be expected not to succeed. Highly prized middle-class status for the child in the classroom was attained by demonstrating ease of interaction among adults; high degree of verbalization in Standard American English; the ability to become a leader; a neat and clean appearance; coming from a family that is educated, employed, living together, and interested in the child; and the ability to participate well as a member of a group.

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[2] The names of all staff and students are pseudonyms. Names are provided to indicate that the discussion relates to living persons, and not to fictional characters developed by the author.

The kindergarten teacher appeared to have been raised in a home where the above values were emphasized as important. Her mother was a college graduate, as were her brother and sisters. The family lived in the same neighborhood for many years, and the father held a responsible position with a public utility company in the city. The family was devoutly religious and those of the family still in the city attend the same church. She and other members of her family were active in a number of civil rights organizations in the city. Thus, it appears that the kindergarten teacher's "normative reference group" coincided quite closely with those groups in which she did participate and belong. There was little discrepancy between the normative values of the mixed black-white educated middle-class and the values of the groups in which she held membership. The attributes indicative of "success" among those of the educated middle class had been attained by the teacher. She was a college graduate, held positions of respect and responsibility in the black community, lived in a comfortable middle-class section of the city in a well-furnished and spacious home, together with her husband earned over $20,000 per year, was active in a number of community organizations, and had parents, brother, and sisters similar in education, income, and occupational positions.

The teacher ascribed high status to a certain group of children within the class who fit her perception of the criteria necessary to be among the "fast learners" at Table 1. With her reference group orientation as to what constitute the qualities essential for "success," she responded favorably to those children who possessed such necessary attributes. Her resultant preferential treatment of a select group of children appeared to be derived from her belief that certain behavioral and cultural characteristics are more crucial to learning in school than are others. In a similar manner, those children who appeared not to possess the criteria essential for success were ascribed low status and described as "failures" by the teacher. They were relegated to positions at Table 2 and 3. The placement of the children then appeared to result from their possessing or lacking the certain desired cultural characteristics perceived as important by the teacher.

The organization of the kindergarten classroom according to the expectation of success or failure after the eighth day of school became the basis for the differential treatment of the children for the remainder of the school year. From the day that the class was assigned permanent seats the activities in the classroom were perceivably different from previously. The fundamental division of the class into those expected to learn and those expected not to permeated the teacher's orientation to the class.

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Student Social Class and Teacher Expecta

RAY C.

[Six pages omitted]

First Grade

Though Mrs. Caplow had anticipated that only twelve of the children from the kindergarten class would attend the first grade in the same school, eighteen of the children were assigned during the summer to the first-grade classroom in the main building. The remaining children either were assigned to a new school a few blocks north, or were assigned to a branch school designed to handle the overflow from the main building, or had moved away. Mrs. Logan, the first-grade teacher, had had more than twenty years of teaching experience in the city public school system, and every school in which she had taught was more than 90 percent black. During the 1968-1969 school year, four informal visits were made to the classroom of Mrs. Logan. No visits were made to either the branch school or the new school to visit children from the kindergarten class who had left their original school. During my visits to the first-grade room, I kept only brief notes of the short conversations that I had with Mrs. Logan; I did not conduct formal observations of the activities of the children in the class.

During the first-grade school year, there were thirty-three children in the classroom. In addition to the eighteen from the kindergarten class, there were nine children repeating the first grade and also six children new to the school. Of the eighteen children who came from the kindergarten class to the first grade in the main building, seven were from the previous year's Table 1, six from Table 2, and five from Table 3.

In the first-grade classroom, Mrs. Logan also divided the children into three groups. Those children whom she placed at "Table A" had all been Table 1 students in kindergarten. No student who had sat at Table 2 or 3 in kindergarten was placed at Table A in the first grade. Instead, all the students from Table 2 and 3—with one exception—were placed together at "Table B." At the third table which Mrs. Logan called "Table C," she placed the nine children repeating the grade plus Betty who had sat at Table 3 in the kindergarten class. Of the six new students, two were placed at Table A and four at Table C. Thus the totals for the three tables were nine students at Table A, ten at Table B, and fourteen at Table C.

The seating arrangement that began in the kindergarten as a result of the teacher's definition of which children possessed or lacked the perceived necessary characteristics for success in the public school system emerged in the first grade as a caste phenomenon in which there was absolutely no mobility upward. That is, of those children whom Mrs. Caplow had perceived as potential "failures" and thus seated at either Table 2 or 3 in the kindergarten, not one was assigned to the table of the "fast learners" in the first grade.

The initial label given to the children by the kindergarten teacher had been reinforced in her interaction with those students throughout the school year. When the children were ready to pass into the first grade, their ascribed labels from the teacher as either successes or failures assumed objective dimensions. The first-grade teacher no longer had to rely on merely the presence or absence of certain behavioral and attitudinal characteristics to ascertain who would do well and who would do poorly in the class. Objective records of the "readiness" material completed by the children during the kindergarten year were available to her. Thus, upon the basis of what material the various tables in kindergarten had completed, Mrs. Logan could form her first-grade tables for reading and arithmetic.

The kindergarten teacher's disproportionate allocation of her teaching time resulted in the Table 1 students' having completed more material at the end of the school year than the remainder of the class. As a result, the Table 1 group from kindergarten remained intact in the first grade, as they were the only students prepared for the first-grade reading material. Those children from Tables 2 and 3 had not yet completed all the material from kindergarten and had to spend the first weeks of the first-grade school year finishing kindergarten level lessons. The criteria established by the school system as to what constituted the completion of the necessary readiness material to begin first-grade lessons insured that the Table 2 and 3 students could not be placed at Table A. The only children who had completed the material were those from Table 1, defined by the kindergarten teacher as successful students and whom she then taught most often because the remainder of the class "had no idea what was going on."

It would be somewhat misleading, however, to indicate that there was absolutely no mobility for any of the students between the seating assignments in kindergarten and those in the first grade. All of the students save one who had been seated at Table 3 during the kindergarten year were moved "up" to Table B in the first grade. The majority of Table C students were those having to repeat the grade level. As a tentative explanation of Mrs. Logan's rationale for the development of the Table C seating assignments, she may have assumed that within her class there existed one group of students who possessed so very little of the perceived behavioral patterns and attitudes necessary for success that they had to be kept separate from the remainder of the class. (Table C was placed by itself on the opposite side of the room from Tables A and B.) The Table C students were spoken of by the first-grade teacher in a manner reminiscent of the way in which Mrs. Caplow spoke of the Table 3 students the previous year.

Students who were placed at Table A appeared to be perceived by Mrs. Logan as students who not only possessed the criteria necessary for future success, both in the public school system and in the larger society, but who also had proven themselves capable in academic work. These students appeared to possess the characteristics considered most essential for "middle-class" success by the teacher. Though students at Table B lacked many of the "qualities" and characteristics of the Table A students, they were not perceived as lacking them to the same extent as those placed at Table C.

A basic tenet in explaining Mrs. Logan's seating arrangement is, of course, that she shared a similar reference group and set of values as to what constituted "success" with Mrs. Caplow in the kindergarten class. Both women were well educated, were employed in a professional occupation, lived in middle-income neighborhoods, were active in a number of charitable and civil rights organizations, and expressed strong religious convictions and moral standards. Both were educated in the city teacher's college and had also attained graduate degrees. Their backgrounds as well as the manner in which they described the various groups of students in their classes would indicate that they shared a similar reference group and set of expectations as to what constituted the indices of the "successful" student.

Second Grade

Of the original thirty students in kindergarten and eighteen in first grade, ten students were assigned to the only second-grade class in the main building. Of the eight original kindergarten students who did not come to the second grade from the first, three were repeating first grade while the remainder had moved. The teacher in the second grade also divided the class into three groups, though she did not give them number or letter designations. Rather, she called the first group the "Tigers." The middle group she labeled the "Cardinals," while the second-grade repeaters plus several new children assigned to the third table were designated by the teacher as "Clowns."[4]

In the second-grade seating scheme, no student from the first grade who had not sat at Table A was moved "up" to the Tigers at the beginning of second grade. All those students who in first grade had been at Table B or Table C and returned to the second grade were placed in the Cardinal group. The Clowns consisted of six second-grade repeaters plus three students who were new to the class. Of the ten original kindergarten students who came from the first grade, six were Tigers and four were Cardinals. Table 2 illustrates that the distribution of social economic factors from the kindergarten year remained essentially unchanged in the second grade.

By the time the children came to the second grade, their seating arrangement appeared to be based not on the teacher's expectations of how the child might perform, but rather on the basis of past performance of the child. Available to the teacher when she formulated the seating groups were grade sheets from both kindergarten and first grade, IQ scores from kindergarten, listing of parental occupations for approximately half of the class, reading scores from a test given to all

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[4] The names were not given to the groups until the third week of school, though the seating arrangement was established on the third day.

TABLE 2

Distribution of Socio-Economic Status Factors by Seating Arrangement in the Three Reading Groups in the Second-Grade Classroom.

Factors	*Seating Arrangement**		
	Tigers	*Cardinals*	*Clowns*
Income			
1) Families on welfare	2	4	7
2) Families with father employed	8	5	1
3) Families with mother employed	7	11	6
4) Families with both parents employed	7	5	1
5) Total family income below $3,000. /yr**	1	5	8
6) Total family income above $12,000. /yr**./	4	0	0
Education			
1) Father ever grade school	8	6	1
2) Father ever high school	7	4	0
3) Father ever college	0	0	0
4) Mother ever grade school	12	13	9
5) Mother ever high school	9	7	4
6) Mother ever college	3	0	0
7) Children with pre-school experience	1	0	0
Family Size			
1) Families with one child	2	0	1
2) Families with six or more children	3	8	5
3) Average number of siblings in family	3-4	6-7	7-8
4) Families with both parents present	8	6	1

* There are twelve children in the Tiger group, fourteen children in the Cardinal group, and nine children in the Clown group.

** Estimated from stated occupation.

students at the end of first grade, evaluations from the speech teacher and also the informal evaluations from both the kindergarten and first-grade teachers.

The single most important data utilized by the teacher in devising seating groups were the reading scores indicating the performance of the students at the end of the first grade. The second-grade teacher indicated that she attempted to divide the groups primarily on the basis of these scores. The Tigers were designated as the highest reading group and the Cardinals the middle. The Clowns were assigned a first-grade reading level, though they were, for the most part, repeaters from the previous year in second grade. The caste character of the reading groups became clear as the year progressed, in that all three groups were reading in different books and it was school policy that no child could go on to a new book until the previous one had been completed. Thus there was no way for the child, should he have demonstrated competence at a higher reading level, to advance, since he had to continue at the pace of the rest of his reading group. The teacher never allowed individual reading in order that a child might finish a book on his own and move ahead. *No matter how well a child in the lower reading groups might have read, he was destined to remain in the same reading group. This is, in a sense, another manifestation of the self-fulfilling prophecy in that a "slow learner" had no option but to continue to be a slow learner, regardless of performance or potential.* Initial expectations of the kindergarten teacher two years earlier as to the ability of the child resulted in placement in a reading group, whether high or low, from which there appeared to be no escape. The child's journey through the early grades of school at one reading level and in one social grouping appeared to be pre-ordained from the eighth day of kindergarten.

The expectations of the kindergarten teacher appeared to be fulfilled by late spring. Her description of the academic performance of the children in June had a strong "goodness of fit" with her stated expectations from the previous September. For the first- and second-grade teachers alike, there was no need to rely on intuitive expectations as to what the performance of the child would be. They were in the position of being able to base future expectations upon past performance. At this point, the relevance of the self-fulfilling prophecy again is evident, for the very criteria by which the first- and second-grade teachers established their three reading groups were those manifestations of performance most affected by the previous experience of the child. That is, which reading books were completed, the amount of arithmetic and reading readiness material that had been completed, and the mastery of basic printing skills all became the significant criteria established by the Board of Education to determine the level at which the child would begin the first grade. A similar process of standard evaluation by past performance on criteria established by the Board appears to have been the basis for the arrangement of reading groups within the second grade. Thus, again, the initial patterns of expectations and her acting upon them appeared to place the kindergarten teacher in the position of establishing the parameters of the educational experience for the various children in her class. The parameters, most clearly defined by the seating arrangement at the various tables, remained intact through both the first and second grades.

The phenomenon of teacher expectation based upon a variety of social status criteria did not appear to be limited to the kindergarten teacher alone. When the second-grade teacher was asked to evaluate the children in her class by reading group, she responded in terms reminiscent of the kindergarten teacher. Though such a proposition would be tenuous at best, the high degree of similarity in the responses of both the kindergarten and second-grade teachers suggests that there may be among the teachers in the school a common set of criteria as to what constitutes the successful and promising student. If such is the case, then the particular individual who happens to occupy the role of kindergarten teacher is less crucial. For if the expectations of all staff within the school are highly similar, then with little difficulty there could be an interchange of teachers among the grades with little or no noticeable effect upon the performance of the various groups of students. If all teachers have similar expectations as to which types of students perform well and which types perform poorly, the categories established by the kindergarten teacher could be expected to reflect rather closely the manner in which other teachers would also have grouped the class.

As the indication of the high degree of similarity between the manner in which the kindergarten teacher described the three tables and the manner in which the second-grade teacher discussed the "Tigers, Cardinals, and Clowns," exerpts of an interview with the second-grade teacher are presented, where she stated her opinions of the three groups.

Concerning the Tigers:

Q: Mrs. Benson, how would you describe the Tigers in terms of their learning ability and academic performance?

R: Well, they are my fastest group. They are very smart.

Q: Mrs. Benson, how would you describe the Tigers in terms of discipline matters?

R: Well, the Tigers are very talkative. Susan, Pamela, and Ruth, they are always running their mouths constantly, but they get their work done first. I don't have much trouble with them.

Q: Mrs. Benson, what value do you think the Tigers hold for an education?

R: They all feel an education is important and most of them have goals in life as to what they want to be. They mostly want to go to college.

The same questions were asked of the teacher concerning the Cardinals.

Q: Mrs. Benson, how would you describe the Cardinals in terms of learning ability and academic performance?

R: They are slow to finish their work . . . but they get finished. You know, a lot of them, though, don't care to come to school too much. Rema, Gary, and Toby are absent quite a bit. The Tigers are never absent.

Q: Mrs. Benson, how would you describe the Cardinals in terms of discipline matters?

R: Not too bad. Since they work so slow they don't have time to talk. They are not like the Tigers who finish in a hurry and then just sit and talk with each other.

Q: Mrs. Benson, what value do you think the Cardinals hold for an education?

R: Well, I don't think they have as much interest in education as do the Tigers, but you know it is hard to say. Most will like to come to school, but the parents will keep them from coming. They either have to baby sit, or the clothes are dirty. These are the excuses the parents often give. But I guess most of the Cardinals want to go on and finish and go on to college. A lot of them have ambitions when they grow up. It's mostly the parents' fault that they are not at the school more often.

In the kindergarten class, the teacher appeared to perceive the major ability gap to lie between the students at Table 1 and those at Table 2. That is, those at Tables 2 and 3 were perceived as more similar in potential than were those at Tables 1 and 2. This was not the case in the second-grade classroom. The teacher appeared to perceive the major distinction in ability as lying between the Cardinals and the Clowns. Thus she saw the Tigers and the Cardinals as much closer in performance and potential than the Cardinals and the Clowns. The teacher's responses to the questions concerning the Clowns lends credence to this interpretation.

Q: Mrs. Benson, how would you describe the Clowns in terms of learning ability and academic performance?

R: Well, they are really slow. You know most of them are still doing first-grade work.

Q: Mrs. Benson, how would you describe the Clowns in terms of discipline matters?

R: They are very playful. They like to play a lot. They are not very neat. They like to talk a lot and play a lot. When I read to them, boy, do they have a good time. You know, the Tigers and the Cardinals will sit quietly and listen when I read to them, but the Clowns, they are always so restless. They always want to stand up. When we read, it is really something else. You know—Diane and Pat especially like to stand up. All these children, too, are very aggressive.

Q: Mrs. Benson, what value do you think the Clowns hold for an education?

R: I don't think very much. I don't think education means much to them at this stage. I know it doesn't mean anything to Randy and George. To most of the kids, I don't think it really matters at this stage.

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The picture of the second-grade teacher, Mrs. Benson, that emerges from analysis of these data is of one who distributes rewards quite sparingly and equally, but who utilizes somewhere between two and five times as much control-oriented behavior with the Clowns as with the Tigers. Alternatively, whereas with the Tigers the combination of neutral and supportive behavior never dropped below 93 percent of the total behavior directed towards them by the teacher in the three periods, the lowest figure for the Cardinals was 86 percent and for the Clowns was 73 percent. It may be assumed that neutral and supportive behavior would be conducive to learning while punishment or control-oriented behavior would not. Thus for the Tigers, the learning situation was one with only infrequent units of control, while for the Clowns, control behavior constituted one-fourth of all behavior directed towards them on at least one occasion.

Research related to leadership structure and task performance in voluntary organizations has given strong indications that within an authoritarian setting there occurs a significant decrease in performance on assigned tasks that does not occur with those in a non-authoritative setting (Kelly and Thibaut, 1954; Lewin, Lippitt, and White, 1939). Further investigations have generally confirmed these findings.

Of particular interest within the classroom are the findings of Adams (1945), Anderson (1946), Anderson, *et. al.* (1946), Preston and Heintz (1949), and Robbins (1952). Their findings may be generalized to state that children within an authoritarian classroom display a decrease in both learning retention and performance, while those within the democratic classroom do not. In extrapolating these findings to the second-grade classroom of Mrs. Benson, one cannot say that she was continually "authoritarian" as opposed to "democratic" with her students, but that with one group of students there occurred more control-oriented behavior than with other groups. The group which was the recipient of this control-oriented behavior was that group which she had defined as "slow and disinterested." On at least one occasion Mrs. Benson utilized nearly five times the amount of control-oriented behavior with the Clowns as with her perceived high-interest and high-ability group, the Tigers. For the Clowns, who were most isolated from the teacher and received the least amount of her teaching time, the results noted above would indicate that the substantial control-oriented behavior directed towards them would compound their difficulty in experiencing significant learning and cognitive growth.

Here discussion of the self-fulfilling prophecy is relevant: given the extent to which the teacher utilized control-oriented behavior with the Clowns, data from the leadership and performance studies would indicate that it would be more difficult for that group to experience a positive learning situation. The question remains unanswered, though, as to whether the behavior of uninterested students necessitated the teacher's resorting to extensive use of control-oriented behavior, or whether that to the extent to which the teacher utilized control-oriented behavior, the students responded with uninterest. If the prior experience of the Clowns was in any way similar to that of the students in kindergarten at Table 3 and Table C in the first grade, I am inclined to opt for the latter proposition.

A very serious and, I believe, justifiable consequence of this assumption of student uninterest related to the frequency of the teacher's control-oriented behavior is that the teachers themselves contribute significantly to the creation of the "slow learners" within their classrooms. Over time, this may help to account for the phenomenon noted in the Coleman Report (1966) that the gap between the academic performance of the disadvantaged students and the national norms increased the longer the students remained in the school system. During one of the three and one-half hour observational periods in the second grade, the percentage of control-oriented behavior oriented toward the entire class was about 8 per cent. Of the behavior directed toward the Clowns, however, 27 per cent was control-oriented behavior—more than three times the amount of control-oriented behavior directed to the class as a whole. Deutsch (1968), in a random sampling of New York City Public School classrooms of the fifth through eighth grades, noted that the teachers utilized between 50 and 80 percent of class time in discipline and organization. Unfortunately, he fails to specify the two individual percentages and thus it is unknown whether the classrooms were dominated by either discipline or organization as opposed to their combination. If it is the case, and Deutsch's findings appear to lend indirect support, that the higher the grade level, the greater the discipline and control-oriented behavior by the teacher, some of the unexplained aspects of the "regress phenomenon" may be unlocked.

On another level of analysis, the teacher's use of control-oriented behavior is directly related to the expectations of the ability and willingness of "slow learners" to learn the material she teaches. That is, if the student is uninterested in what goes on in the classroom, he is more apt to engage in activities that the teacher perceives as disruptive. Activities such as talking out loud, coloring when the teacher has not said it to be permissible, attempting to leave the room, calling other students' attention to activities occurring on the street, making comments to the teacher not pertinent to the lesson, dropping books, falling out of the chair, and commenting on how the student cannot wait for recess, all prompt the teacher to employ control-oriented behavior toward that student. The interactional pattern between the uninterested student and the teacher literally becomes a "vicious circle" in which control-oriented behavior is followed by further manifestations of uninterest, followed by further control behavior and so on. The stronger the reciprocity of this pattern of interaction, the greater one may anticipate the strengthening of the teacher's expectation of the "slow learner" as being either unable or unwilling to learn.

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[Nine pages omitted]